Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

CHEVY CHASE BANK, F.S.B., ET AL.,
Petitioners,

v.

DALE WELLS, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the Maryland Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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December 22, 2003

QUESTION PRESENTED

Where the federal government has occupied the field, can a state court interpret a standard contractual choice-of-law provision to impose otherwise preempted state law on the contracting parties?

LIST OF PARTIES

1. Chevy Chase Bank, F.S.B. and Bank One Delaware, N.A. (formerly First USA Bank, N.A.) are the petitioners in this Court, defendants in the Circuit Court for Baltimore City, Maryland and were appellees in the Maryland Court of Appeals.

2. Dale Wells, Sharon Goldenberg and John Dovel are the respondents in this Court, plaintiffs in the Circuit Court for Baltimore City, Maryland and were appellants in the Maryland Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioners provide the following corporate disclosures pursuant to Supreme Court Rule 29.6:

1. Chevy Chase Bank, F.S.B. states that 80% of its stock is owned by the B.F. Saul Real Estate Investment Trust. No other publicly-held corporation owns 10% or more of its stock.

2. Bank One Delaware, N.A. states that it is a wholly-owned subsidiary of Bank One Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Chevy Chase Bank, F.S.B. ("Chevy Chase") and Bank One Delaware, N.A. hereby petition for a writ of certiorari to review the judgment of the Maryland Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Maryland Court of Appeals (App. 1a-43a) is reported at 377 Md. 197, 832 A.2d 812 (2003). The opinion and order of the Circuit Court for Baltimore City, Maryland (App. 44a-52a) is unreported.

JURISDICTION

The judgment of the Maryland Court of Appeals was entered on September 23, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (2003).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The constitutional provision, statutes and regulations involved are Art. VI, cl. 2 of the United States Constitution; Section 5(a) of the Home Owners' Loan Act, 12 U.S.C. § 1464(a) (2003); 12 C.F.R. § 560.2 (2003); and Title 12, Subtitle 9 of the Maryland Commercial Law Article, MD. CODE ANN., COM. LAW §§ 12-901 *et seq.* (2002) (hereafter "Subtitle 9"). They are reproduced in Appendix C. (App. 53a-100a.)

STATEMENT OF THE CASE

1. *Introduction.* The Office of Thrift Supervision ("OTS") "occupies the entire field of lending regulation for federal savings associations." 12 C.F.R. § 560.2(a). (App. 54a.) *See also* 12 U.S.C. § 1464(a). (App. 53a-54a.) The express purpose of OTS's occupation of the field is "[t]o enhance the safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the

public free from undue regulatory duplication and burden)." 12 C.F.R. § 560.2(a). (App. 54a.) OTS's field preemption regulations specifically preempt, among other things, state laws, such as Maryland's Subtitle 9, that require disclosures of certain information in credit-related documents. 12 C.F.R. § 560.2(b). (App. 55a-56a.)

In the case below, the Maryland Court of Appeals held that, notwithstanding OTS's field preemption of state lending laws governing federal savings associations, Subtitle 9 could be imposed on a federal lender simply because that state law is referred to in the choice-of-law provision in the lender's contract with its credit cardholders. The court's decision directly conflicts with the decisions of this Court and every other federal court that has considered the issue, as well as with the position of OTS itself. Moreover, the Court of Appeals' decision creates a dangerous precedent for other state courts to undermine the federal government's occupation of the field not only in the regulation of federal lenders but in any area in which ubiquitous contractual choice-of-law provisions could be "interpreted" to override preemptive federal law.

2. *Statement of Facts.* This case arose from a lawsuit on behalf of former credit cardholders of Chevy Chase, a federal savings association. The Cardholder Agreement embodying the terms of the credit card contract between Chevy Chase and its customers contained a change-in-terms provision that permitted Chevy Chase to "amend the terms of [the] Agreement in accordance with applicable law at any time." (App. 46a.) The Cardholder Agreement also contained a choice-of-law provision, entitled "Governing Law," which defined the "governing law" of the contract as "Subtitle 9 of

Title 12 of the Commercial Law Article of the Maryland Annotated Code and applicable federal laws." (App 47a.)[1]

On January 16, 1996, Chevy Chase, with the approval of OTS, relocated its "home office," as defined by applicable federal regulations, from Maryland to Virginia. (App. 4a.) In connection with that relocation, Chevy Chase amended the choice-of-law provision to provide that the Cardholder Agreement "is subject to and governed by Virginia law and applicable federal laws and regulations." *Id.* Chevy Chase subsequently amended other provisions of the Cardholder Agreement, including finance charges and other fees. (App. 4a-5a.) Notice of the amendments was provided in

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[1] The choice-of-law provision referred to Subtitle 9, rather than Maryland law generally, because Maryland maintains several different usury laws potentially applicable to lenders. Unlike most states that do so, Maryland specifically requires lenders to designate the "new" and more flexible usury laws (of which Subtitle 9 is a part) in writing in their credit agreements in order to avoid being subjected to the more restrictive provisions of the "old" usury laws set forth in Subtitle 3 of Title 12 of the Maryland Commercial Law Article and elsewhere. *See* MD. CODE ANN., COM. LAW § 12-913.1 (2002). Thus, Chevy Chase needed to designate Subtitle 9 as the governing *state* law in order to ensure that it would govern any aspect of the Cardholder Agreement that might not be governed by preemptive federal law, and in order to obtain maximum flexibility with respect to interest rates and related charges, as to which federal regulations look to state law. *See* 12 U.S.C. § 1463(g) (2003); 12 C.F.R. § 560.110(b) (2003) (authorizing federal savings institutions to "export" the "most favored lender" interest rate and charges of the state in which they are located).

accordance with the Truth-in-Lending Act ("TILA"), which is the applicable law pursuant to OTS regulations. *See Lending & Investment*, 61 Fed. Reg. 50951, 50965-66 (Sept. 30, 1996).

3. *The Proceedings Below.* The three named plaintiffs in the case below continued to use their credit cards subject to the amended terms and conditions without protest or objection for three years. On January 15, 1999, one day short of the applicable statute of limitations, they commenced this action in the Circuit Court for Baltimore City, Maryland, against Chevy Chase and Bank One Delaware, N.A., which had purchased Chevy Chase's credit card business in 1998. (App. 5a.) The complaint alleges that Chevy Chase breached the Cardholder Agreement and committed unfair and deceptive trade practices when it amended the Cardholder Agreement in 1996, because Chevy Chase allegedly failed to give notice of the amendments in accordance with the provisions of Subtitle 9, which impose disclosure requirements beyond those required by TILA. (App. 5a-6a.)

Chevy Chase moved to dismiss the complaint on the ground that Subtitle 9 was preempted by federal law. Plaintiffs acknowledged that fact but contended that Chevy Chase had obligated itself to follow the notice provisions of Subtitle 9 by referring to that statute in the choice-of-law provision of the Cardholder Agreement. (App. 45a-46a.)

The circuit court granted Chevy Chase's motion, characterizing plaintiffs' argument as "both ingenious, and a trifle disingenuous." (App. 51a.) The court noted, "It seems both implausible and inconsistent with federal preemption to claim that a state regulatory scheme was agreed to between the parties by a mere reference to Subtitle 9 [in the choice-of-law clause]." *Id.* The court explained that "[the parties] could not waive federal preemption and could only have intended that state law apply as 'governing law' should 'federal law' not apply." (App. 52a.)

Plaintiffs sought review of this decision in the Maryland Court of Appeals. Initially, the Court of Appeals denied plaintiffs' petition for a writ of certiorari. Subsequently, however, the court granted certiorari on its own initiative, and reversed the circuit court in a 6-1 decision. (App. 1a-43a.)

The Court of Appeals necessarily acknowledged that OTS has occupied the field and that Subtitle 9 is therefore preempted. (App. 19a-21a.) The court nonetheless held that, because the choice-of-law provision in the Cardholder Agreement refers to state law, that provision could be interpreted to mean that Chevy Chase had contractually obligated itself to comply with the notice provisions of the otherwise preempted state law. (App. 22a-42a.) In reaching that conclusion, the court relied heavily on this Court's decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), which held that express contractual obligations are not preempted by federal law. (App. 24a-29a.) The Court of Appeals concluded, therefore, that the mere reference to Subtitle 9 in the choice-of-law provision could be interpreted as an incorporation by reference of all of the terms of Subtitle 9 as express contractual obligations. (App. 38a-42a.)

While *Wolens* did not involve the question presented in this case – whether a contractual choice-of-law provision can ever be read as an election by the contracting parties to override preemptive federal law – the court below distinguished another decision of this Court that addressed this precise issue and definitively answered it in the negative. *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982) ("*Fidelity*"). The Court of Appeals erroneously read *Fidelity* as applying only to cases where the chosen state law is in direct conflict with federal law. (App. 35a-36a.) The court similarly purported to distinguish the subsequent decisions of lower federal courts that uniformly hold that a choice-of-law provision cannot be interpreted to allow the application of preempted state law instead of preemptive federal law. (App. 36a-38a.)

In view of its holding that plaintiffs' breach of contract claims based on Subtitle 9 were not preempted, the court remanded the case to the circuit court to determine, pursuant to state law canons of contract construction, whether the Cardholder Agreement obligated Chevy Chase to follow the notice requirements of Subtitle 9. (App. 42a.)

REASONS FOR GRANTING THE PETITION

The decision below flatly contradicts this Court's decision in *Fidelity*, 458 U.S. 141, and the uniform decisions of the lower federal courts that a contractual choice-of-law provision cannot be read to "choose" a designated state's laws over preemptive federal law. Those decisions are based on the fundamental principle, enunciated by this Court in *Fidelity*, that pursuant to the Supremacy Clause, Art. VI, cl. 2, "the Constitution, laws and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution." 458 U.S. at 157. Thus, while a contractual choice-of-law provision can designate which state law will govern the parties' agreement (since none is superior to the other), the parties cannot elect to impose a subordinate state law in favor of superior federal law. Since the Maryland Court of Appeals' decision, if left in place, will create both confusion and a sweeping exception to this heretofore well-established principle of federal preemption, this Court should grant review.

It takes little imagination to recognize the destructive effect the decision below will have on OTS's effort to establish consistent regulation of the lending operations of federal savings associations. Under the decision below, all it takes for a concededly preempted "consumer protection" state law to be applied to a federal lending institution is a choice-of-law provision that refers to state law. Because choice-of-law provisions are virtually universal in credit and loan agreements, all of these state laws will be revived, even though they were preempted precisely because OTS believed

federal savings institutions should not be "subject to a hodge-podge of conflicting and overlapping state lending requirements." 61 Fed. Reg. 50951, 50965. Although the federal courts have consistently rejected this result, this is the first decision of a state's highest court on the subject. As such, it provides a roadmap for all other state courts to subject federal savings institutions to inconsistent and onerous state law regulation through the back door of "contract interpretation." Needless to say, states have a vested and well-documented interest in bringing federal savings institutions within their regulatory ambit, thereby significantly undermining the uniform, national regulatory scheme that OTS has established to promote the safety and soundness of those institutions.

Nor will this abrogation of well-settled preemption principles be limited to federal savings or other financial institutions. Because choice-of-law provisions are common in all types of commercial contracts, the decision below will be used to reassert state law through the back door in other areas of regulation, such as the Employment Retirement Income Security Act, 29 U.S.C. § 1144(a) (2003) ("ERISA"), in which the federal government has occupied the field. This Court should not condone the lower court's transparent effort to undermine the careful balance struck by federal regulators through its impermissible manipulation of "contract interpretation" principles.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE UNIFORM DECISIONS OF THIS COURT, OTHER FEDERAL COURTS AND OTS

Until the court below issued its decision, every court that has considered this issue, including this Court, held that a contractual choice-of-law provision cannot be read to override preemptive federal law. In *Fidelity*, this Court struck down a California state law prohibiting due-on-sale clauses in mortgage agreements on the ground that it was preempted by

federal regulations that permitted such clauses. (A due-on-sale clause allows the lender to declare the entire balance of a loan immediately payable when the property securing the loan is sold, and OTS's predecessor had authorized federal savings associations to include such clauses in their loan contracts.) 458 U.S. at 145-46. The plaintiffs in that case argued that, notwithstanding preemptive federal law, the more restrictive state law should apply because the governing law provisions of the loan documents in question provided that they would be "governed by the law of the jurisdiction in which the Property is located." *Id.* at 148. Unlike Chevy Chase's Cardholder Agreement, which explicitly referred to federal law as well as Maryland's Subtitle 9, the governing law provisions in *Fidelity* did not even mention federal law.

Nonetheless, this Court held that "the incorporation of state law does not signify the inapplicability of federal law, for a 'fundamental principle in our system of complex national polity' mandates that 'the Constitution, laws and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution.'" *Id.* at 157 (quoting *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880)). The Court therefore rejected the plaintiffs' argument that the choice-of-law provision meant that the parties to the contract agreed to be bound by the restrictive state law. The Court noted in this regard that "the 'law of the jurisdiction' includes federal as well as state law." *Id.* at 157 n.12. The Court also pointed out that the purpose of the contractual reference to local law was "not to elevate state law over federal law, but to provide a uniform choice-of-law provision to be used when interstate disputes arose regarding the interpretation of a mortgage." *Id.*

In short, both because private parties are obviously powerless to elevate state law over federal law and because state law necessarily incorporates federal law, reference to state law in a choice-of-law provision cannot be interpreted as a promise to be bound by otherwise preempted state law. This prudent rule, of course, also avoids presenting lending

institutions with the Hobson's Choice of either foregoing choice-of-law provisions or having a state court subsequently "interpret" these provisions to expose them to the host of consumer protection laws that federal regulators have deemed unduly burdensome or otherwise inconsistent with the national regulatory scheme. Perhaps most important, the *Fidelity* rule avoids the undermining of the distinct regulatory balance struck by federal regulators that would result from indirectly exposing federally regulated institutions to a patchwork of non-uniform and conflicting state laws.

To be sure, federal lending institutions, like all contracting parties, can *directly* promise to provide consumers with benefits in addition to those required by federal law and of the sort mandated by preempted state law. Thus, the savings association in *Fidelity* could have promised that the balance of the loan would not be due when the securing property was sold, or Chevy Chase could have promised to provide cardholders with notice in addition to that required by TILA. This simply reflects the fact that contracting parties may promise anything not prohibited by law and that a court can enforce such voluntarily undertaken contractual obligations without disrupting the federal regulatory scheme. This Court's decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) makes this obvious point.

In *Wolens*, this Court held that the Airline Deregulation Act ("ADA"), which preempts state laws purporting to regulate airlines' rates, routes or services, precluded private claims against the airline based on state consumer protection laws. *Id.* at 226-28. The Court nevertheless allowed claims seeking to enforce "self imposed undertakings" expressly promised in the "contract terms" by the airline, because the "terms and conditions airlines offer and passengers accept are privately-ordered obligations," which can be enforced like other voluntarily offered consideration for a contract. *Id.* at 228. The Court thus distinguished between claims seeking to enforce express promises contained within the four corners of

the contract, which are not preempted, and claims that involve "enlargement or enhancement based on state laws or policies external to the agreement," which are preempted. *Id.* at 233.

Thus, *Wolens* and *Fidelity* set forth a quite straightforward preemption principle. While companies subject to extensive federal regulation may voluntarily undertake to commit themselves to actions not required by federal law (or putatively required by preempted state law), a contractual choice-of-law provision stating that a particular state's law governs cannot be interpreted as a commitment by the promisor to abide by such preempted state law. This "distinction between what the State dictates and what the [promisor] itself undertakes confines courts, in breach-of-contracts actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Wolens*, 513 U.S. at 233.

The Maryland Court of Appeals – alone among lower courts – flipped this straightforward rule on its head by concluding that a choice-of-law provision referencing state law is *equivalent* to an express agreement to voluntarily undertake to do all that is required by the preempted state law. In this regard, the court below contemptuously stated that the distinction set forth in *Wolens* – between contractual obligations contained directly in the agreement and state laws external to the agreement – "make[s] absolutely no sense"

because it "fails to distinguish between the preemption issue and the contract interpretation issue." (App. 39a.)[2] But, of course, it is the Maryland Court of Appeals that mangles both contract interpretation and preemption doctrine by invoking the plainly inapposite *Wolens* rule that applies to specific promises in the document, rather than the obviously controlling *Fidelity* rule that applies to choice-of-law provisions that reference state law external to the agreement. The Court of Appeals' fundamental error is in stark conflict with the uniform view of the lower federal courts and OTS's own interpretation of the preemptive force of its field preemption regulation.

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[2] In this regard, the court reasoned that the issue of whether a choice-of-law provision may incorporate external state policies is "a question of state law" and thus, apparently, immune from this Court's rulings specifying which contractual language can form the basis for a contractual challenge to enforce preempted state law. (App. 39a.) Incredibly, to support this facially erroneous result, the court relied on a series of cases that in no way suggest that the requirements of a preempted state law can become private contractual rights merely because the state law is mentioned in a choice-of-law provision. Indeed, the cases relied on expressly hold that, under *Wolens*, the contractual provisions were "preempted by the ADA" because they sought to "impose common law principles and policies on the agreement between the two parties . . . ." *Breitling USA, Inc. v. Fed. Express Corp.*, 45 F. Supp. 2d 179, 183-84 (D. Conn. 1999) (quoted at App. 40a). *See also Smith v. Comair, Inc.*, 134 F.3d 254, 258 (4th Cir. 1998) (holding contract claim was "preempted under the ADA" because plaintiff's "contract claim can only be adjudicated by reference to law and policies external to the parties' bargain") (also quoted at App. 40a).

For example, in *Atkinson v. General Electric Credit Corp.*, 866 F.2d 396 (11th Cir.), *cert. denied*, 493 U.S. 815 (1989), the Eleventh Circuit found that the plaintiff's usury claim under Georgia law was preempted because the loan contract at issue complied with the requirements of governing federal regulations. 866 F.2d at 397, 399. The loan agreement specified that the governing law was the law of Georgia, with no reference to federal law. Applying the principle set forth in *Fidelity*, however, the court held that the governing law provision could mean only that Georgia state law would govern matters not controlled by preemptive federal law. *Atkinson*, 866 F.2d at 398. *See also Brown v. Investors Mortgage Co.*, 121 F.3d 472, 476 (9th Cir. 1997) (holding that provision stating that loan "shall be governed by the laws of the State of Washington" did not waive lender's federal preemption defense); *Fantastic Fakes, Inc. v. Pickwick Int'l, Inc.*, 661 F.2d 479, 483 (5th Cir. 1981) (holding that contractual choice-of-law provision "merely designates the state whose law is to be applied to the extent its use is not preempted by nor contrary to the policies of" federal copyright law). As the court explained in *Jones v. United States Fidelity & Guaranty Co.*, Civ. A. No. 90-5005, 1992 U.S. Dist. LEXIS 12303, at *10 (E.D. La. Aug. 5, 1992), "the purpose of a choice-of-law provision in a contract is to ensure that the law of State A, as opposed to State B, will govern the contract. The parties may not use a choice-of-law provision to provide that state law, instead of federal law, will apply to a federal question."

All of these cases recognize that where the federal government has chosen to regulate a particular activity or field, as it has done with respect to the lending activities of federal savings banks like Chevy Chase, neither states nor private parties can elect to ignore such federal law in favor of preempted state law, because state law necessarily incorporates the preemptive federal scheme.

Thus, in analyzing the effect of a choice-of-law provision in an arbitration agreement, the Third Circuit differentiated between what it called "horizontal" choice-of-law – "whether the laws of State X or State Y supply the relevant rule of decision" – and "vertical" choice-of-law: "whether the rule of decision is supplied by the laws of State X or by federal law." *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293-94 (3d Cir.), *cert. denied*, 534 U.S. 1020 (2001). On the latter choice, the court explained:

> Judge-made choice-of-law doctrines (and, accordingly, attempts by contracting parties to influence their application with choice-of-law clauses) have no applicability to answering this question because the relevant rule is supplied by the Constitution itself: a valid federal law preempts any state law purporting to regulate the same issue. *See* U.S. Const. Art. VI.

Id. at 293-94. In other words, the Supremacy Clause precludes courts from ruling that parties have elected state law over preemptive federal law by means of a contractual choice-of-law provision.

Similarly, in *Fantastic Fakes, Inc.*, 661 F.2d 479, the Fifth Circuit specifically considered whether a choice-of-law provision in a copyright license that designated Georgia law meant that such state law would supersede rights and obligations created by federal copyright law. *See id.* at 482-83. The court held that the choice-of-law provision could not be read in that fashion because preemptive federal law cannot be nullified by state law. *Id.* at 483. Accordingly, the court held that the choice-of-law provision could be read only to mean that Georgia law applied to the extent not otherwise preempted by federal law. *Id. See also Atkinson*, 866 F.2d at 398.

OTS itself has reached the same conclusion. In an opinion letter issued just two weeks after the decision below, OTS

stated that "reference to federal law and state law in a choice-of-law provision includes the preemptive effect of federal law" and does not obligate the lender to follow the preempted New York state law. OTS Opinion Letter P-2003-7 (Oct. 6, 2003). (App. 101a-108a.) Citing *Fidelity*, OTS explained that the reference to state law in the choice-of-law provision "does not nullify or negate the preemptive effect of federal law." (App. 106a.) Accordingly, OTS opined that the lender was not obligated to pay interest on escrow accounts, which is required by New York law but not by federal law.[3]

The court below attempted to evade the clear conflict with *Fidelity* and the lower federal courts' interpretation of it by "distinguishing" these cases on facially erroneous grounds that merely confirm the court's fundamental misunderstanding of the controlling law. The court below claimed that *Fidelity* was different than the instant case because *Fidelity* involved a "direct conflict between federal regulations permitting due-on-sale clauses in mortgage agreements and restrictions placed by the California Supreme Court on the exercise of the clauses." (App. 36a.)[4] But this

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[3] OTS's interpretation and application of its own field preemption regulations is, of course, entitled to substantial deference. *See Lyng v. Payne*, 476 U.S. 926, 939 (1986); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

[4] In a similar vein, the Court of Appeals mistakenly concluded that there is no conflict between the notice requirements of TILA and the notice requirements of Subtitle 9 because TILA does not preempt state disclosure laws. (App. 35a-36a.) The court failed to take into account that because OTS has occupied the field of lending regulation, including regulation of disclosures, TILA effectively becomes the applicable disclosure standard for federal savings associations and, insofar as they are concerned, preempts state

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purported distinction is both factually inaccurate and legally erroneous. First, the conflict here is precisely the *same* as the *Fidelity* conflict. In neither *Fidelity* nor the instant case did state law prohibit what federal law *required.* As this Court noted, federal law permitted, but did not require, the due-on-sale clauses allegedly proscribed by state law. *Fidelity*, 458 U.S. at 155. Here, federal regulations permitted, but did not require, Chevy Chase to give notice of amendments to its cardholders that are prohibited as insufficient under Maryland's Subtitle 9. In both cases, then, state law is preempted because it prohibits what federal law *allows* and therefore creates an "obstacle to the accomplishment and execution of the full purposes and objectives" of the federal government. *Fidelity*, 458 U.S. at 156 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). *See also, Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996). Indeed, this is undisputed, since, as respondents conceded and the Court of Appeals held, Maryland's "Subtitle 9 is preempted" because it imposes "additional requirements [on] a credit agreement with a federal savings association" and thus is "inconsistent with OTS's expressed intention to 'occupy the entire field of lending regulation for federal

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disclosure laws. *See Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 565-66 (9th Cir. 2002) (anti-preemption provision of Electronic Fund Transfer Act does not preserve state or local laws preempted by the Home Owners' Loan Act). OTS made this point explicitly in promulgating its field preemption regulations. *See* 61 Fed. Reg. 50951, 50965-66. Yet the Court of Appeals either ignored or did not understand this basic fact. (App. 35a-36a.)

savings associations.'" (App. 21a.)[5] Thus, as in *Fidelity*, the restrictions placed by the Maryland Court of Appeals on the notice provided by Chevy Chase – through interpretation of a choice-of-law provision – is in direct conflict with federally *authorized* activity. (App. 36a.)

In any event, it is legally irrelevant whether state law is preempted because it directly conflicts with federal law or because the federal government has occupied the field. In either case, the preemptive federal law is incorporated into state law and thus, under *Fidelity*, a choice of Maryland law necessarily incorporates the preemptive federal law. Thus, the kind or source of federal preemption is utterly immaterial to the question of whether a choice-of-law provision may incorporate federal law. Consequently, the lower court's interpretation of *Fidelity* as disapproving only those choice-of-law provisions where the promisor binds itself to a state law that affirmatively *violates* a "conflicting federal law" is clearly without merit. (App. 35a.) Indeed, so interpreting *Fidelity* would nonsensically reduce it to reflect nothing more than the basic contract law principle that a promise to perform an illegal act is unenforceable.

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[5] This conclusion simply recognizes the obvious point that Subtitle 9 is preempted because OTS occupies the entire field of regulation of the lending operations of federal lenders, "leaving no room for the States to supplement federal law." *N.W. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989). *See also Cal. v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989) (state laws are preempted either when they conflict with federal law or when the federal government has occupied the field); *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 368-69 (1986) (states may not regulate where Congress or a federal agency acting within the scope of its delegated authority has occupied the field).

For the same reason, the Court of Appeals' attempt to distinguish *Jones* is unavailing. The decision below stated that *Jones* was "inapposite" because it involved ERISA, "a 'deliberately expansive' statute designed to make regulation of employee benefit plans an exclusively federal concern." (App. 38a (quoting *Jones*, 1992 U.S. Dist. LEXIS 12303, at *7).) Again, this does not factually distinguish the instant case because OTS, pursuant to broad statutory authorization, has likewise promulgated "deliberately expansive" regulations designed to make lending regulation of federal savings institutions "an exclusively federal concern." And, again, there is no legal significance to this "distinction" because it is conceded that Subtitle 9 is preempted by the OTS regulation, and *Fidelity* applies to all preempted laws, without regard to how they are preempted.

The lower court's efforts to distinguish other squarely conflicting cases were similarly meritless. *Fantastic Fakes* and *Roadway Package System* were "distinguished" on the ground that they did not involve "preemption," but rather "contract interpretation." (App. 37a.) As established above, however, both cases squarely held that a choice-of-law provision *could not* be "interpreted" to mean that a subordinate state law was elected over a superior federal law – reasoning that is irreconcilable with the result reached by the Maryland Court of Appeals.

Moreover, for the reasons already indicated, *Wolens* provides no support for the decision below.[6] Neither *Wolens* nor any of the other cases cited by the court below even suggests that the requirements of a preempted state law can become private contractual undertakings merely because the

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[6] The cases applying *Wolens* have recognized that its exception to the preemptive effect of federal law "is a narrow one." *Breitling*, 45 F. Supp. 2d at 184.

state law is mentioned in a choice-of-law provision. (App. 29a.)[7] *Wolens* teaches only that, if Chevy Chase had voluntarily included specific provisions in the Cardholder Agreement promising to give notice of amendments to the Agreement in a manner not required by federal law, such express contractual obligations could be enforced without regard to preemption. But Chevy Chase did not do so. The supposed contractual notice requirements that the plaintiffs seek to impose on Chevy Chase can be found only by looking *outside* of the contract to Subtitle 9 and importing that preempted law's requirements into the Cardholder Agreement

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[7] *See Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) (Federal Arbitration Act does not preempt state procedures governing the conduct of arbitration proceedings, and therefore parties may contract to apply state rules and procedures to such proceedings); *Ass'n of Int'l Auto. Mfrs. v. Comm'r, Mass. Dep't of Envtl. Prot.*, 208 F.3d 1 (1st Cir. 2000) (Massachusetts emission standards are preempted by federal Clean Air Act and were not embodied in any independent contractual obligations); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (express terms and conditions of contract are not preempted by the federal Copyright Act); *Cent. States S.E. & S.W. Areas Health & Welfare Fund v. Pathology Labs.*, 71 F.3d 1251 (7th Cir. 1995), *cert. denied*, 517 U.S. 1233 (1996) (ERISA did not preempt bills for medical services that were not covered by welfare benefit plan). The remaining cases cited by the lower court hold simply that express contractual warranty claims are not preempted by federal law. *See Martin v. Ford Motor Co.*, 914 F. Supp. 1449 (S.D. Tex. 1996); *Kawamata Farms, Inc. v. United Agric. Prods.*, 948 P.2d 1055 (Haw. 1997); *Wallace v. Parks Corp.*, 629 N.Y.S.2d 570 (App. Div. 1995).

by means of the choice-of-law provision. Such an endeavor is exactly what *Wolens* (and *Fidelity*) prohibits. 513 U.S. at 233.

In short, *Wolens* in no way suggests that the mention of Subtitle 9 in the "Governing Law" provision of the Cardholder Agreement could represent an incorporation by reference of that law's requirements as private contractual undertakings. (App. 38a-40a.) In fact, *Fidelity* and the uniform line of lower federal authorities subsequent to *Fidelity* emphatically state that the Supremacy Clause prohibits such an interpretation.

In sum, the Maryland Court of Appeals' decision not only conflicts directly with *Fidelity* and the decisions of other federal courts; it misapplies *Wolens* in a way that is likely to create mischief and confusion, particularly among the state courts, about the proper application of the Supremacy Clause in contract cases. This Court should grant certiorari in order to eliminate the conflict and to restore order in a previously settled area.

II. THE DECISION BELOW WILL SUBVERT UNIFORM OTS REGULATION OF FEDERAL LENDERS AND WILL UNDERMINE PREEMPTION IN OTHER AREAS IN WHICH THE FEDERAL GOVERNMENT HAS OCCUPIED THE FIELD

The decision below, although manifestly erroneous, cannot be disregarded as the isolated product of a lower federal or state court. Rather, it is a detailed pronouncement by the highest court of the State of Maryland, and the first decision on this issue by the highest court of any state. Choice-of-law provisions exist in virtually every consumer and commercial contract. *See Roadway Package Sys.*, 257 F.3d at 292. Pursuant to the opinion below, any such contract between a federal lender and its customers could be interpreted pursuant to state law contract principles to mean that the lender has obligated itself to comply with otherwise preempted state law.

Thus, unless it is promptly reversed, the decision will serve as precedent for other states to impose their regulatory and consumer protection laws on federal lenders, regardless of OTS's uniform national regulatory scheme. OTS's regulatory scheme would have little vitality in such circumstances.[8]

The Maryland court's decision is particularly damaging because it turns the OTS regulations on their head. Those regulations contain a "savings clause," which preserves basic state "contract and commercial laws" to the extent such laws "only *incidentally* affect the lending operations of federal savings institutions." 12 C.F.R. § 560.2(c) (emphasis added). (App. 56a.) The "savings clause" merely reflects that federal savings institutions are not immune from the basic infrastructure of generally applicable laws, such as state uniform commercial codes and tort laws, that underlie commercial transactions. *See* 61 Fed. Reg. 50951, 50966. It obviously does not provide a basis for interpreting a choice-of-law provision to incorporate concededly preempted state laws that *directly and substantially* affect lending operations. *See id.* Not only does *Fidelity* preclude such "contract interpretation" as a general matter, but OTS, as noted, has

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[8] Nor can the effect of the decision be minimized simply because the Court of Appeals did not finally decide the contract interpretation question but rather remanded the case to the trial court to determine whether the Cardholder Agreement obligated Chevy Chase to follow the notice provisions of Subtitle 9. (App. 42a.) The mischief results from the Court of Appeals' holding that a choice-of-law provision *can* be interpreted to nullify preemptive federal law. Once that proposition is accepted, state courts can ignore the Supremacy Clause and apply state law contract principles to convert preempted state law into private contractual obligations.

expressly confirmed that its regulations *do* preempt any such application of choice-of-law provisions to revive preempted "consumer protection" statutes. Any potential ambiguity in this regard was eliminated by what OTS stated in promulgating this provision:

> OTS wishes to make clear that the purpose of paragraph (c) is to preserve the basic infrastructure of basic state laws that undergird commercial transactions, *not to open the door to state regulation of lending by federal savings associations*. . . . For these purposes, paragraph (c) is intended to be interpreted narrowly. *Any doubt should be resolved in favor of preemption.*

61 Fed. Reg. 50951, 50966-67 (emphases added).

Contrary to that admonition, the court below held that, under 12 C.F.R. 560.2(c), a state regulation that *directly* affects lending operations can be imposed on a federal savings association through a contractual choice-of-law provision. Because the court determined that a reference to a state's laws in a choice-of-law provision should be analyzed under state contract law, pursuant to the exception in 12 C.F.R. § 560.2(c), rather than analyzing whether the particular state law allegedly being "chosen" is preempted by OTS under 12 C.F.R § 560.2(a) and (b), the court widened the exception to swallow the rule. The whole purpose of contractual choice-of-law provisions is to designate which state law to apply to a given contract (to the extent not preempted by federal law). *See Roadway Package Sys.*, 257 F.3d at 293-94; *Fantastic Fakes*, 661 F.2d at 483. Therefore, the lower court's misreading of the OTS regulations serves as precedent for other state courts hostile to preemptive federal regulation to eviscerate the OTS's uniform national regulatory regime. Federal savings institutions would once again be subject to "undue regulatory duplication and burden." 12 C.F.R. § 560.2(a).

This is not merely a hypothetical concern. The federal Office of the Comptroller of the Currency ("OCC") has recently proposed regulations for national banks that would preempt state law in a manner similar to the OTS regulations for federal savings institutions. *See Bank Activities & Operations, Real Estate Lending & Appraisals*, 68 Fed. Reg. 46119 (Aug. 5, 2003). In response, the Attorneys General for all fifty states, as well as the Virgin Islands and the District of Columbia, have submitted comments strenuously opposing the adoption of such regulations and insisting that national banks should be subject to the states' consumer protection laws. (App. 109a-141a.) The decision below provides a powerful weapon to the states' Attorneys General and courts to overcome any attempt by OCC, as well as OTS, to implement and maintain a uniform national set of regulations that free federal lenders from duplicative and conflicting state law requirements.

The potential ramifications of the Maryland decision go well beyond the field of lending regulation. The extent to which ERISA preempts state regulation of HMO's and medical insurance decisions is a subject of continuing controversy. *See, e.g., Difelice v. Aetna U.S. Healthcare*, 346 F.3d 442 (3d Cir. 2003); *Arana v. Ochsner Health Plan*, 338 F.3d 433 (5th Cir. 2003); *Singh v. Prudential Health Care Plan, Inc.*, 335 F.3d 278 (4th Cir.), *cert. denied*, 03-478, 2003 U.S. LEXIS 9007 (2003). Because contracts in this area also contain choice-of-law provisions, the decision below will be used to circumvent ERISA, even on matters in which it is intended to completely preempt state laws. More generally, since states understandably seek the broadest scope for their regulatory requirements, the decision provides a clear roadmap for evading the federal government's occupation of any field to maintain state regulatory control of any parties that have contracts with choice-of-law provisions.

To ensure that this does not occur and to maintain the integrity of OTS's uniform national regulatory regime, this

Court should grant review of the Maryland Court of Appeals' decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 22, 2003

APPENDICES

APPENDIX A

832 A.2d 812

Court of Appeals of Maryland.

Dale WELLS, et al.

v.

CHEVY CHASE BANK, F.S.B., et al.

No. 41 Sept. Term 2002.

Sept. 23, 2003.

F. Paul Bland, Jr. (Leslie Bruekner of Trial Lawyers for Public Justice of Washington, DC,; John T. Ward, Robert B. Kershaw of Ward Kershaw, P.A. of Baltimore; Michael P. Malakoff of Malakoff, Doyle & Finberg, P.C. of Pittsburgh, PA), on brief, for appellants.

David J. Cynamon (Erica S. Simpson of Shaw Pittman LLP, on brief), Washington, DC, for appellees.

Argued before BELL, C.J., ELDRIDGE, RAKER, WILNER, CATHELL, HARRELL and BATTAGLIA, JJ.

BELL, Chief Judge.

In this case, we are asked to resolve whether a credit-card agreement (the "Cardholder Agreement"), between Dale Wells, Sharon Goldenberg and John Dovel, the appellants, and Chevy Chase Bank, F.S.B. and U.S.A. Bank, N.A., the appellees, contractually bound the appellees to comply with provisions of Subtitle 9, which address the form of the notice required when a Cardholder Agreement is amended, where the Cardholder Agreement in the section captioned "Governing Law," references Subtitle 9 of the Commercial Law Article, Md.Code (1975, 2000 Repl.Vol.), §§ 12-901 – 12-924 of the Commercial Law

Article ("Subtitle 9") and "applicable federal law." Although the parties agree that State laws purporting to regulate the appellees' lending activities have been preempted by § 5(a) of the Homeowners Loan Act ("HOLA") 12 U.S.C. 1464(a) and its implementing regulations, *see* 12 C.F.R. pt. 560, the appellants characterize the reference to Subtitle 9 in the Cardholder Agreement as a provision in a contract, which, notwithstanding federal preemption, defines a particular aspect of the relationship between the parties, the manner in which notice is to be given when the Cardholder Agreement is amended. Consequently, rather than because it was a failure to comply with state law, the appellants seek to recover damages from the appellees for breach of their contract with the appellants to comply with Subtitle 9 when amending the Cardholder Agreement. The Circuit Court for Baltimore City observed that it "seems both implausible and inconsistent with federal preemption to claim that a state regulatory scheme was agreed to between [the] parties by a mere reference to Subtitle 9" and, thus, rejected the appellants' argument. We do not agree. Accordingly, we shall reverse and remand the case to the Circuit Court for further proceedings.

I.

This is not the first occasion on which this case, the parties to it and the issues presented by it, have been before this Court. *Wells v. Chevy Chase Bank, F.S.B., et al.*, 363 Md. 232, 768 A.2d 620 (2001) ("*Wells I*") was an appeal taken from an order compelling arbitration. Preparatory to addressing the substantive issue that case presented, whether the appellants agreed to arbitrate, we summarized the factual and procedural history of the case:

"Plaintiffs' first amended complaint alleges that the Defendants, in a number of aspects, breached the open end credit agreement (the Cardholder Agreement) in effect between Plaintiffs, as cardholders of credit cards issued by Chevy Chase, and Chevy Chase, as card-issuing credit grantor.

"Prior to January 16, 1996, Chevy Chase had maintained its home office in Maryland.[1] The Cardholder Agreement provided for an annual fee, a minimum late charge fee of fifteen dollars, described the method of computing the finance charge, and stated that the 'ANNUAL PERCENTAGE RATE will never exceed 24%' With respect to amendments the Cardholder Agreement read:

'We may amend the terms of this Agreement in accordance with applicable law at any time. Also we may at any time add new credit services, discontinue any credit services, or replace your card with another card.'

"The Cardholder Agreement also contained a 'Governing Law' provision reading:

'This Agreement is made in Maryland. It is governed by Subtitle 9 ['Credit Grantor Revolving Credit Provisions'] of Title 12 ['Credit Regulations'] of the Commercial Law Article of the Maryland Annotated Code and applicable federal laws.'

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[1] Regulations of the Office of Thrift Supervision, United States Department of the Treasury, state that "[a]ll operations of a Federal savings association shall be subject to direction from the home office." 12 C.F.R. § 545.91.

"There was no mediation or arbitration provision in the Cardholder Agreement.

"On or about January 16, 1996, Chevy Chase moved its home office to Virginia. With the periodic statements mailed in January and February of 1996 to its cardholders, Chevy Chase included a notice of change of terms of the Cardholder Agreement. The notice of change took the form of a restatement and revision of the Cardholder Agreement, with the new or revised terms italicized and, with respect to a waiver of jury trial provision, both italics and all uppercase print was used. Solely for purposes of this appeal, and without indicating any opinion on whether the Cardholder Agreement was effectively amended or whether the amendments are substantively valid, we shall call the product of the January and February mailings the 'Amended Agreement.' The Amended Agreement provided that it was made in Virginia and was 'subject to and governed by Virginia law and applicable federal law and regulations.' The Amended Agreement further recited that '[t]he parties agree that by engaging in activities with or involving each other, they are participating in transactions involving interstate commerce.'

"Also contained in the Amended Agreement was an alternative dispute resolution section which in relevant part reads:

'Mediation and Arbitration – Any controversy or claim ("Claim") between or among you and us or our agents, employees and affiliates, including but not limited to those arising out of or relating to this Agreement or any related agreements, including without limitation any Claim based on or arising from an alleged tort, shall, at the request

and expense of the claiming party, be submitted to mediation, using the rules of the American Arbitration Association ("AAA").'

'If mediation fails to resolve the Claim within 30 days from the date of engagement, then the Claim shall be determined by binding arbitration. (Mediation or Arbitration, as appropriate, are sometimes referred to below as the 'Proceeding'.) Arbitration shall be conducted in accordance with the United States Arbitration Act (Title 9, U.S. Code), notwithstanding any choice of law provision in this Agreement, and under the rules of the AAA. Either you or we may, by summary proceedings (e.g., a plea in abatement or motion to stay further proceedings), bring an action in any court having jurisdiction for the sole purpose of compelling compliance with these mediation and arbitration provisions.'

"On or about September 30, 1998, First U.S.A.[2] purchased the credit card portfolio of Chevy Chase.

"Plaintiffs instituted the . . . action [in *Wells I*] in January 1999. They allege that the defendants breached the Cardholder Agreement by charging interest in excess of twenty-four percent, by increasing the interest on past balances, by failing to provide legally required notice of the amendments, by changing the method of calculating the finance charge without proper notice, and by increasing the late fees and over-limit fees without proper notice. Plaintiffs also allege violation of the Maryland Consumer Protection Act, Maryland

[2] One of the appellee's in the case *sub judice*

> Code (2000 Repl.Vol.), §§ 13-101(d) and 13-303(3) of the Commercial Law Article (CL)."

Wells I, 363 Md. at 235-37, 768 A.2d at 621-22 (footnote omitted). This history applies as well to the case *sub judice.*

The Court identified the principal theory of the appellants' case as being that the Cardholder Agreement had not been effectively amended and elucidated the supporting rationale underlying it:

> "Plaintiffs principally rely on CL § 12-912 that addresses amendment of the agreement governing a revolving credit plan. In broad strokes, that section requires, 'at least 25 days before the effective date of the amendment,' a clear and conspicuous written notice, 'if the amendment has the effect of increasing the interest, finance charges, or other fees and charges to be paid by the borrower . . . or altering the manner of their computation.' § 12-912(b)(1). The notice must include '[a] clear statement comparing the original terms and the terms under the amended agreement.' § 12-912(b)(1)(i). The initial notice is also to include 'a statement that a second notice will be sent in the borrower's next periodic statement.' § 12-912(c)(7). Both notices are to be in ten point type. Id. The notice is to advise of the cardholder's optional right to refuse the amendment and to describe the manner of refusing. § 12-912(c)(7)(ii). Where, as here, the plan charges an annual fee, rejection of the amendment entitles the cardholder to 'use the account pursuant to its original, unamended terms, for . . . the duration of the time for which a fee was paid for use of the plan.' § 12-912(c)(5)(i)1.

"In addition, § 12-912(e) provides:

> 'If the terms of the agreement governing the plan, as originally drawn or amended[,] provide, any amendment may, on or after the date on which it becomes effective as to a particular borrower, apply to all then outstanding unpaid indebtedness in the borrower's account under the plan, including any indebtedness which shall have arisen out of purchases made or loans obtained prior to the effective date of the amendment.'"

Wells I, 363 Md. at 237-38, 768 A.2d at 622-23.

We noted, that in addition to moving to compel arbitration, the appellees also argued in the trial court that § 12-912, on which the appellants principally relied, was preempted by 12 C.F.R. § 560.2(a), a regulation of the Office of Thrift Supervision (OTS) that undertakes to "occupy[ ] the entire field of lending regulation for federal savings associations." *Id.* As indicated, the motion to compel arbitration prevailed in the trial court, prompting the appellants' appeal.

In response, the appellees moved to dismiss the appeal, arguing that the Maryland law permitting an appeal from an order compelling arbitration was, itself, preempted by 9 U.S.C. § 16(b)(2) of the Federal Arbitration Act. This preliminary procedural issue, *see Wells I,* 363 Md. at 235, 768 A.2d at 621, was premised on the fact that the arbitration order "'was entered in the context of a larger breach of contract dispute, the arbitration issue was 'embedded' in appellants' contract and state statutory claims, and therefore the Arbitration Order is not an appealable 'final decision' for purposes of FAA § 16.'" *Wells I,* 363 Md. at 242, 768 A.2d at 625, quoting the appellees'

brief, which cited *In re Pisgah Contractors,* 117 F.3d 133, 136 (4th Cir.1997).[3]

The Court resolved both the preliminary procedural issue and the substantive issue in favor of the appellants and, thus, reversed the judgment of the Circuit Court. As to whether the parties agreed to arbitrate, it reasoned:

> "The arbitration clause in the Amended Agreement in this case is susceptible of but one reasonable interpretation. The promise is to mediate and, if necessary, arbitrate 'at the request and expense of the claiming party.' The Plaintiffs are the claiming parties, not the Defendants. This conclusion is neither altered, nor the language made ambiguous, by the provision in the next following paragraph reading: 'Either you or we may, by summary proceedings (e.g., a plea in abatement or motion to stay further proceedings), bring an action in any court having jurisdiction

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[3] Pursuant to 9 U.S.C. 16(a)(3), "an appeal may be taken from . . . a final decision with respect to an arbitration that is subject to this title." Despite this apparently clear direction, the appellees relied on a definition of "final decision" drawn by some federal cases, "one that resolves an 'independent' action, in which the 'sole issue before the district court is the arbitrability of the [underlying] dispute.'" *Wells v. Chevy Chase Bank, F.S.B., et al.,* 363 Md. 232, 241-42, 768 A.2d 620, 625 (2001), quoting the appellees's brief, which, in turn, quoted *In re Pisgah Contractors,* 117 F.3d 133, 136 (4th Cir.1997) (quoting *Humphrey v. Prudential Sec., Inc.,* 4 F.3d 313, 317 (4th Cir.1993)). Thus, the appellees argue, citing *Pisgah* and *American Cas. Co. v. L-J, Inc.,* 35 F.3d 133, 136 (4th Cir.1994), "Where arbitration is only 'one issue among others for the district court to resolve,' the arbitration issue is considered to be 'embedded,' and an order compelling arbitration in such a case is an unappealable interlocutory order within the meaning of FAA § 16(b), even if the order compels arbitration of all substantive claims involved in the dispute."

> for the sole purpose of compelling compliance with these mediation and arbitration provisions.' Ordering the claiming party to mediate and, 'if mediation fails' to arbitrate, when the claiming party has not requested mediation does not compel compliance with the mediation and arbitration clause provisions; rather, an order so compelling exceeds those provisions."

Wells I, 363 Md. at 251-52, 768 A.2d at 630.[4]

Therefore, the issue we resolved in *Wells I,* related solely to whether "the appellants . . . agreed to arbitrate,"[5] *id.* at 235, 768 A.2d at 621. This was an issue related to, but different from the issue the parties principally argued which was whether the appellees' attempt to amend the Cardholder Agreement was effective. Although, the gravamen of the complaint in *Wells I,* as it is in the case

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[4] Neither party argued the plain meaning of the contract. We noted, however, our discretion to consider the argument, even if a new issue, especially when to do so avoids the need to decide a constitutional issue, in this case, the preemption of § 12-912. *Wells I,* 363 Md. at 252, 768 A.2d at 631, citing *Baltimore Sun Co. v. Mayor & City Council of Baltimore,* 359 Md. 653, 659, 755 A.2d 1130, 1133-34 (2000); *Professional Staff Nurses Ass'n v. Dimensions Health Corp.,* 346 Md. 132, 138-40, 695 A.2d 158, 160-61 (1997).

[5] As we explained, the appellees defended against the complaint in *Wells I* "by moving, pursuant to the [Federal Arbitration Act], to compel mediation/arbitration in accordance with the Amended Agreement." *Id.* at 238, 768 A.2d at 623. The trial court granted the appellees' Motion to Compel Arbitration, whereupon, the appellants noted an appeal from the trial court's order compelling arbitration. Responding to the appeal, the appellees filed a Motion to Dismiss the Appeal arguing "[b]ecause the Arbitration Order here was entered in the context of a larger breach of contract dispute, the arbitration issue was 'embedded' in appellants' contract and state statutory claim, and therefore the Arbitration Order is not an appealable 'final order' for purposes of the FAA § 16."

sub judice, centered on that latter question, this Court did not address it. Indeed, we expressly did not venture an opinion as to "whether the Cardholder Agreement was effectively amended or whether the amendments are substantively valid." *Id.* at 236, 768 A.2d at 622.

On remand, the question of whether arbitration was a requirement having already been decided was squarely before the court for resolution. As they had done in the earlier action, the appellants argued that the Cardholder Agreement had not been amended effectively and that the appellees, therefore were in breach of the contractual terms of the unamended Cardholder Agreement. Once again, the appellants relied on the Governing Law provision of the Agreement, emphasizing that provision's reference to "Subtitle 9 of Title 12 of the Commercial Law Article of the Maryland Annotated Code."

The Circuit Court for Baltimore City, agreeing that appellants' claims are preempted by federal law, granted the appellees' motion to dismiss. It opined:

> "[I]t is both ingenuous, and a trifle disingenuous to, to admit that the specific state imposed notice restrictions are preempted by federal law, while at the same time contend that the general reference to Maryland law, as the governing law, specifically reincorporates into the Cardholder Agreement these provisions as private agreements. It seems both implausible and inconsistent with federal preemption to claim that a state regulatory scheme was agreed to between the parties by the mere reference to Subtitle 9. This is a great deal beyond the scope of preserving the traditional infrastructure of state laws that undergird commercial transactions.
>
> * * *

> "This court is convinced that to permit [appellants] to thwart the admitted preemption of the relevant law solely because of a general reference to Maryland law, flies in the face of common sense and contract interpretation. When the parties mentioned Subtitle 9 [of Title 12] of the Maryland Code and "applicable federal law" as governing law, they did not incorporate the protections of a Maryland regulatory scheme into the agreement. Had they meant to do that, they could have done so in clear-cut terms. As the *Chaires* [*v. Chevy Chase Bank,* 131 Md.App. 64, 748 A.2d 34 (2000), *cert. denied,* 359 Md. 334, 753 A.2d 1031 (2000),] case makes clear, they could not waive federal preemption and could only have intended that state law apply as 'governing law' should 'federal law' not apply. There is no basis for claiming that they entered into a private agreement incorporating a complex and detailed state regulatory scheme."

The appellants noted an appeal to the Court of Special Appeals and this Court issued, on its own initiative, a Writ of Certiorari, *Wells v. Chevy Chase,* 369 Md. 570, 801 A.2d 1031 (2002), prior to any proceedings in the intermediate appellate court.

Although, the appellants agree that Subtitle 9 is preempted by HOLA and its implementing regulations, they nevertheless insist that the appellees' agreement to comply with that subtitle's relevant notice provisions and protections may still be enforced. The appellants argue, in other words, that while Subtitle 9 may not be invoked to evaluate the adequacy of a credit agreement where there is no agreement by the parties as to its applicability, when there is such an agreement, federal preemption cannot negate the appellees' promise. They rely on *American*

Airlines v. Wolens, 513 U.S. 219, 228-29, 115 S.Ct. 817, 823-824, 130 L.Ed.2d 715, 725-726 (1995), which they submit stands for the proposition that parties to a commercial transaction may elect, as a self-imposed, voluntary undertaking, to follow otherwise preempted state law and thus preserve state law claims for breach of contract. The appellants also find support for their position in 12 C.F.R. § 560.2. Section (c) of that regulation exempts, *inter alia,* contract and commercial laws "to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section." Consequently, they argue that the claims they advance have been expressly excluded from the preemptive scope of HOLA and the OTS regulations.

The appellees rejoin that the appellants have misinterpreted the governing law provision of the Cardholder Agreement. Specifically, they characterize the appellants' argument that the parties agreed to a notice regime prescribed by an otherwise preempted statute as an "attempt to impose Subtitle 9's preempted regulatory requirements on Chevy Chase through the back door of the choice-of-law provision in the Cardholder Agreement." The appellants' contract claim would not exist, they argue, if the requirements of Subtitle 9 are not imposed on Chevy Chase. Furthermore, they submit that a mere reference in the 'governing law" provision of the Cardholder Agreement is insufficient to transform a preempted state law into a private contract. With respect to the exception to preemption recognized in 12 C.F.R. § 560.2(c), they point out that, in 61 Fed.Reg. 50951, 50966 (1966), the OTS noted the narrowness of the exception:

> "OTS wishes to make clear that the purpose of paragraph (c) is to preserve the traditional infrastructure of basic state laws that undergird commercial transactions, not to open the door to state regulation of lending by federal savings associations. . . . For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption."

The appellees rely on *Chaires v. Chevy Chase Bank,* 131 Md.App. 64, 748 A.2d 34, *cert. denied,* 359 Md. 334, 753 A.2d 1031 (2000), which they contend rejected the precise argument, on virtually identical facts, being made by the appellants. It also was correctly decided, they maintain.

The appellants' reliance on the Supreme Court's holding in *Wolens* is rejected by the appellees as being "unsupported by an analysis of the holding in that case." Contending that, if relevant, it supports their position, the appellees argue (citing *Wolens,* 513 U.S. at 233, 115 S.Ct. at 826-827, 130 L.Ed.2d at 728-729) "[t]he Supreme Court held in *Wolens* that claims based on state laws or policies external to a contract, as opposed to the express terms of the contract, are preempted by governing federal law. . . . [The appellants'] claims in this case are premised entirely on the terms of Subtitle 9, all of which are external to the Cardholder Agreement itself. Thus, those claims are preempted."

II.

The federal preemption doctrine has its origin in the Supremacy Clause of the United States Constitution. *See,* U.S. Const., Art. VI, cl. 2. That Clause provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

The constitutional mandate imposed on this Court by the Supremacy Clause requires this Court to declare state law unenforceable to the extent that federal law expressly so provides or the circumstances indicate that federal law supercedes state law.

The rules governing preemption are well settled.[6] Preemption may occur in one of three ways. Where Congress has expressly stated its intent to preempt state law, federal law prevails. *Law v. Int'l Union of Operating Engineers Local No. 37, AFL-CIO,* 373 Md. 459, 467, 818 A.2d 1136, 1141 (2003) (citing *Harrison v. Schwartz,* 319 Md. 360, 364, 572 A.2d 528, 530, *cert. denied,* 498 U.S. 851, 111 S.Ct. 143, 112 L.Ed.2d 110 (1990)); *see also, Becker v. Litty,* 318 Md. 76, 86, 566 A.2d 1101, 1106 (1989). Preemption of state laws also may still occur, even where Congress has not expressly stated its intention in that regard, if there is evidence of Congress' intent to "occupy a

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[6] While the law may be settled, the Supreme Court recently remarked:

> "This relatively clear and simple mandate has generated considerable discussion in cases where we have had to discern whether Congress has preempted state action in a particular area." *Lorillard Tobacco Co., v. Reilly,* 533 U.S. 525, 540, 121 S.Ct. 2404, 2414, 150 L.Ed.2d 532, 550 (2001).

given field," and the state law falls within that field. *Harrison,* 319 Md. at 364, 572 A.2d at 530. Finally, state law is preempted when "compliance with both federal and state law is a physical impossibility." *Law,* 373 Md. at 466-67, 818 A.2d at 1141 (2003) (citing *Sanders v. State,* 57 Md.App. 156, 167, 469 A.2d 476, 482, *cert. denied,* 299 Md. 656, 474 A.2d 1345 (1984).

Determining whether a state law has been preempted by federal law is ordinarily a question of "congressional intent." *Fidelity Federal Savings and Loan Assoc., et. al., v. de la Cuesta, et al.,* 458 U.S. 141, 152, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664, 674 (1982); *see also, Barnett Bank N.A., v. Nelson,* 517 U.S. 25, 30, 116 S.Ct. 1103, 1107, 134 L.Ed.2d 237, 243 (1996) ("[The preemption] question is basically one of congressional intent"); *FMC Corp., v. Holliday,* 498 U.S. 52, 56, 111 S.Ct. 403, 407, 112 L.Ed.2d 356, 363 (1990) ("in determining whether federal law preempts a state statute, we look to congressional intent."); *Malone v. White Motor Corp.,* 435 U.S. 497, 504, 98 S.Ct. 1185, 1190, 55 L.Ed.2d 443, 450 (1978) ("The purpose of Congress is the ultimate touchstone" of preemption analysis.) (quoting *Retail Clerks Int'l Assoc. v. Schermerhorn,* 375 U.S. 96, 103, 84 S.Ct. 219, 223, 11 L.Ed.2d 179, 184 (1963)).

Moreover,

> "[f]ederal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. *United States v. Shimer,* 367 U.S. 374, 381-382, 81 S.Ct.

> 1554, 6 L.Ed.2d 908 (1962). When the administrator promulgates regulations intended to preempt state law, the court's inquiry is similarly limited:
>
> 'If [his] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned. *Id.* at 383, 81 S.Ct. 1554.'"

de la Cuesta, supra, 458 U.S. at 153-154, 102 S.Ct. at 3022-3023, 73 L.Ed.2d at 675. When reviewing the preemptive effect of federal regulations on state laws, a court must not confine its inquiry to whether Congress intended to preempt state law. Rather, the appropriate inquiry, the Court instructs, considers whether the administrative agency intended to preempt state law and whether the action taken was within the delegation of authority by Congress. *Id.,* at 154, 102 S.Ct. at 3023, 73 L.Ed.2d at 676.

In this case, we are concerned with Congressional intent in enacting the HOLA and the intent of the OTS, the federal agency charged with administering the HOLA, when it promulgated the regulations to implement that act. The HOLA was enacted by Congress largely in response to the effect the Great Depression had on the national housing market. *See generally, Glendale Federal Savings & Loan Assoc. v. Fox,* 459 F.Supp. 903, 908 (C.D.Cal.1978). Its purposes were:

> "'To provide emergency relief with respect to home mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them and who are unable to

> amortize their debt elsewhere, to amend the Federal Home Loan bank Act, to increase the market for obligations of the United States and for other purposes.' Preamble, 48 Stat. 128 (1933)."

A significant component of HOLA was the creation of a "system of federal savings and loans associations." *Id.* at 909. Rather than subject the operation of federal savings and loans associations to state regulation, much of which was "ill-advised" and the object of the remedial legislation, Congress created the Home Owners' Loan Corporation, the predecessor of the Office of Thrift Supervision, *id.* at 908, and "gave the Bank Board plenary authority over the creation and operation of federal associations." *Id.* at 909. *See* § 5(a), which provides:

> "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known 'Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrifts and home-financing institutions in the United States. 12 U.S.C. § 1464(a)."

Thus,

> "Federal savings and loan associations were not to be operated and regulated by what a particular state conceived to be the 'best practices.' Rather, the Bank Board was delegated by Congress the authority to select from the prevailing practices in all states what it deemed the best

> practices and to prescribe a nationwide system of operation, supervision, and regulation which would apply to all federal associations."

Glendale Federal, 459 F.Supp. at 909.

Comprehensive rules and regulations have been adopted by OTS and its predecessor agency concerning the "powers and operations of every Federal savings and loan association from its cradle to its corporate grave." *de la Cuesta, supra,* 458 U.S. at 145, 102 S.Ct. at 3018, 73 L.Ed.2d at 669, citing *California v. Coast Fed. Sav. & Loan Ass'n,* 98 F.Supp. 311, 316 (S.D.Cal.1951). Critically important to the analysis that governs the dispute *sub judice* is, as we have seen, 12 C.F.R. § 560.2 (2002),[7] promulgated by the OTS.

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[7] As relevant, 12 C.F.R. § 560.2 (2002) provides:

"(a) Occupation of field. Pursuant to section 4(a) and 5(a) of the HOLA, 12 U.S.C. 1463(a), 1464(a), OTS is authorized to promulgate regulations that preempt state laws affecting the operations of federal savings associations when deemed appropriate to facilitate the safe and sound operation of federal savings associations to conduct their operations in accordance with the best practices of thrift institutions in the United States, or to further other purposes of the HOLA. To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulations for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, a federal savings association may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or

(Continued on following page)

Section (a) of the regulation makes clear that OTS intended to occupy the "entire field of lending regulations for federal savings associations" and that the regulations it promulgated would preempt state laws, defined as "any state statute, regulation, ruling, order or judicial decision," affecting operation of federal savings associations "when deemed appropriate to facilitate the safe and sound operation of federal savings associations to conduct their operations in accordance with the best practices of thrift institutions in the United States, or to further other

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otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section or § 560.110 of this part. For purposes of this section, 'state law' includes any state statute, regulation, ruling, order or judicial decision.

"(b) Illustrative examples. Except as provided in § 560.110 of this part, the types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding:

"(4) The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or terms of maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

"(9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit applications forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants;

"(c) State laws that are not preempted. State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:

"(1) Contract and commercial law."

purposes of the HOLA." The kinds of laws preempted are illustrated in section (b), including those purporting to impose requirements regarding the terms of credit and disclosure and advertising. *See* 12 C.F.R § 560.2(b)(4) and 12 C.F.R. § 560.2(b)(9). Section (c) exempts from preemption those state laws that only incidentally affect lending operations or that are consistent with section (a)'s purpose of "giv[ing] federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation."

Subtitle 9, the Maryland statute at issue in the case, contains the "Credit Grantor Revolving Credit Provisions." The term "Revolving credit plan" is defined to

> "mean a plan that contemplates the extension of credit under an account governed by an agreement between the credit grantor and a borrower under which:
>
> "(1) the credit grantor permits the borrower and, if the agreement governing the plan permits, persons acting on behalf of or with the authorization from the borrower to make purchases or obtain loans from time to time;
>
> "(2) The amounts of purchases and loans are charged to the borrower's account;
>
> "(3) The borrower is required to pay the credit grantor the amounts of all purchases and loans charged to the borrower's account under [the] plan but has the privilege of paying amounts due from time to time as agreed; and
>
> "(4) Interest or finance charges may be charged and collected by the credit grantor from time to time on the amounts due under the plan."

Md.Code (1975, 2000 Repl.Vol.), § 12-901(e) of the Commercial Law Article. Additional statutory provisions in Subtitle 9 provide explicit directives for the regulation of revolving credit plans in the State of Maryland, including, without limitation, variation in interest rates, the amount of fees and charges that may be imposed, and procedures for amending revolving credit plans. Because they impact how credit grantors may operate and conduct their lending activities, which is inconsistent with OTS's expressed intention to "occupy the entire field of lending regulation for federal savings associations," any attempt to enforce these provisions as a matter of State law and as additional requirements of a credit agreement with a federal savings association must fail. The appellees appropriately conceded that Subtitle 9 *qua* Subtitle 9 is preempted.[8]

Notwithstanding the concession, the appellants pursue the appellees on a breach of contract theory. The

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[8] Under the guidelines for preemption analysis set forth by the OTS in 1998, a court's "first step will be to determine whether the type of law in question is listed in paragraph (b) [of 12 C.F.R. 560.2]." If so, the analysis will end there; the law is preempted." (61 Fed.Reg. 50951, 50966 (Sept. 30, 1996)). On the other hand:

> "If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption."

Id. at 50996-50997. Looking to 12 C.F.R. 560.2(b)(4) and (b)(9), it is manifestly obvious, as the trial court concluded, and all the parties agree, that Subtitle 9 has been preempted.

issue that must be resolved, therefore, is whether the cause of action, or at least, the basis for the claimed breach, is preempted.

The cause of action is not preempted. The OTS regulations expressly exempt from preemption "contract and commercial law . . . that . . . only incidentally affect[s] the lending operations of Federal savings associations or [is] otherwise consistent with" the purpose of the regulations. 12 C.F.R. § 560.2(c). That intention was confirmed in 61 Fed.Reg. at 50966: "OTS wants to make clear that it does not intend to preempt basic state laws such as state uniform commercial codes and state laws governing real property, contracts [or] torts . . . ." *See also Derenco, Inc. v. Benjamin Franklin Federal Savings & Loan Ass'n,* 281 Or. 533, 577 P.2d 477, 481-88, *cert. denied,* 439 U.S. 1051, 99 S.Ct. 733, 58 L.Ed.2d 712 (1978) (applying state common-law restitutionary principles to loan-related activities of federal lenders); *Fenning v. Glenfed, Inc.,* 40 Cal.App.4th 1285, 1295-99 (1995), *review denied,* 1996 Cal. LEXIS 1870 (1996) (suit against a federal thrift for fraud and unfair business practices not preempted by HOLA nor its implementing regulations); *People ex rel Sepulveda v. Highland Federal Savings & Loan,* 14 Cal.App.4th 1692, 1708, 19 Cal.Rptr.2d 555, *cert. denied, sub nom.*

Highland Fed. Sav. & Loan Ass'n v. California, 510 U.S. 928, 114 S.Ct. 338, 126 L.Ed.2d 282 510 U.S. 928, (1993) ("we have found no provision of HOLA nor any particular regulation, and none have been cited to us, which expressly preempt the statutory action by the People for unfair business practices and the causes of action by the tenant plaintiffs for fraud, RICO violations, etc."); *Siegel v. American Savings & Loan Ass'n,* 210 Cal.App.3d 953, 258 Cal.Rptr. 746, 748-53 (1989) (suit

based on a variety of state-law claims, including unfair competition, breach of contract, and breach of agency duty, permitted against federal lender); *Konynenbelt v. Flagstar Bank,* 242 Mich.App. 21, 617 N.W.2d 706, 712-14 (2000) (HOLA does not preempt common-law tort and contract claims); *Flanagan v. Germania, F.A.,* 872 F.2d 231, 234 (8th Cir.1989) (claim for tortious interference with contract not preempted by HOLA); *Tuxedo Beach Club Corp. v. City Federal Savings Bank,* 749 F.Supp. 635, 648 (D.N.J.1990) (private right of action under state consumer protection law not preempted by HOLA);. *Morse v. Mutual Federal Savings & Loan of Whitman,* 536 F.Supp. 1271, 1280-81 (D.Mass.1982) ("[t]he fact that federal statutes or regulations covering some aspects of a regulated area are, by necessity, complex and detailed, does not imply that Congress intended to occupy the entire field to the exclusion of state law").

Nor is a federal lenders' contractual undertakings preempted. The OTS regulations indicate that OTS "occupies the entire field of lending regulations for federal savings associations." In that regard, they provide that, consistent with OTS's intent "to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation," a federal savings association may extend credit as authorized under federal law . . . without regard to state laws purporting to regulate or otherwise affect their credit activities." Thus, the regulations apply only to State law, which they define as including "any state statutory regulation, ruling order or judicial decision." § 560.2(a). *See* 61 Fed.Reg. 50591 at 10 ("the terms of the . . . loan should be a matter of contract between the savings

association and the purchaser"). *Wolens,* 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715, is instructive on this point.

In *Wolens,* the United States Supreme Court addressed the preemptive effect of the Airline Deregulation Act of 1978(ADA), 49 U.S.C.App. § 1305,[9] on state-imposed regulation of the airline industry. There, the plaintiffs, participants in American Airlines' frequent flyer program, AAdvantage, sued the Airline, challenging the retroactive application to them of modifications the Airline made to the program in 1988. 513 U.S. at 224-25, 115 S.Ct. at 822, 130 L.Ed.2d at 723 (describing American Airline's AAdvantage modifications which included the imposition of capacity controls and blackout dates). Acknowledging and conceding the right of the Airline to change the terms and conditions of the program, the plaintiffs there complained that the application of the program modifications retroactively devalued the credits they had already earned and, thus, violated the Illinois Consumer Fraud and Deceptive Business Practices Act and was a breach of the Airline's

[9] At issue in that case was the scope of § 1305(a)(1) of the Airline Deregulation Act, "specifically, its application to a state-court suit, brought by participants in an airline's frequent flyer program, challenging the airline's retroactive changes in terms and conditions of the program." *American Airlines v. Wolens,* 513 U.S. 219, 221-22, 115 S.Ct. 817, 820, 130 L.Ed.2d 715, 721 (1995). That section, a preemption provision, provides: "No State . . . shall enact or enforce a law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or service of any carrier." *Id.* at 222, 115 S.Ct. at 821, 130 L.Ed.2d at 722. Similar to the intent of the HOLA and 12 C.F.R. § 560.2(a) (2002), to avoid "undue regulatory duplication and [state imposed regulatory] burden," a key component of Congress' mission in deregulating domestic air transport was "[t]o ensure that the States would not undo federal deregulation with regulation of their own." *Id.*

contract with them. *Id.* at 225, 115 S.Ct. at 822, 130 L.Ed.2d at 723. The Supreme Court of Illinois denied the plaintiffs the injunction they sought, holding that to issue one would be a regulation of the Airline's current rendering of service, but, opining that "only those State laws and regulations that specifically relate to and have more than a tangential connection with an airline's rates, routes or services" are preempted, allowed their breach of contract and consumer actions to proceed. *Id* at 225, 115 S.Ct. at 822, 130 L.Ed.2d at 724. Having reconsidered that decision in light of the intervening decision in *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992),[10] as instructed by the United States Supreme Court, the Illinois court reconfirmed its earlier decision validating the consumer and contract actions.

The Supreme Court addressed the actions separately. It held that the consumer action was preempted. *Wolens,* 513 U.S. at 228, 115 S.Ct. at 824, 130 L.Ed.2d at 725. Using the National Association of Attorneys General's guidelines, invalidated in *Morales,* as a standard, the Court observed:

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[10] Section 1305(a)(1) of the ADA was also at issue in *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992). The Court, in that case, construed the phrase, "related to [airline] rates, routes, or services," to mean "having a connection with, or reference to, airline 'rates, routes, or services [.]'" *id.* at 384, 112 S.Ct. at 2037, 119 L.Ed.2d at 167. Consequently, the Court held that Travel Industry Enforcement Guidelines, composed by the National Association of Attorneys General (NAAG), purporting to govern, *inter alia,* the content and format of airline fare advertising was preempted by the ADA. *Id.* at 379, 112 S.Ct. at 2034-2035, 119 L.Ed.2d at 164-165.

> "the Illinois Consumer Fraud Act serves as a means to guide and police the marketing practices of the airlines; the Act does not simply give effect to bargains offered by the airlines and accepted by airline customers. In light of the full text of the preemption clause, and of the ADA's purpose to leave largely to the airlines themselves, and not at all to States, the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services, n4 we conclude that § 1305(a)(1) preempts plaintiffs' claims under the Illinois Consumer Fraud Act."

Wolens, 513 at 228, 115 S.Ct. at 823-824, 130 L.Ed.2d at 725. It agreed with the Airline, "Congress could hardly have intended to allow the States to hobble [competition for airline passengers] through the application of restrictive state laws." *Id.* at 228, 115 S.Ct. at 824, 130 L.Ed.2d at 735-726.

The Court reached the opposite result with respect to the contract action. It reasoned:

> "We do not read the ADA's preemption clause, however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings. As persuasively argued by the United States, terms and conditions airlines offer and passengers accept are privately ordered obligations "and thus do not amount to a State's 'enactment or enforcement [of] any law, rule, regulation, standard, or other provision having the force and effect of law' within the meaning of [§] 1305(a)(1)." ... Cf. *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 526, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (plurality opinion) ("[A] common-law remedy for a

> contractual commitment voluntarily undertaken should not be regarded as a 'requirement . . . *imposed under State law*' within the meaning of [Federal Cigarette Labeling and Advertising Act] § 5(b)."). A remedy confined to a contract's terms simply holds parties to their agreements – in this instance, to business judgments an airline made public about its rates and services."

Id. at 228-29, 115 S.Ct. at 824, 130 L.Ed.2d at 725-726. (Footnotes omitted). The Court rejected any suggestion that the preemption provision applied to private contracts. Noting the use of the word, "enforce," and suggesting that preemption might be extended to "even state-court enforcement of private contracts," it concluded that "the word series 'law, rule, regulation, standard, or other provision . . . connotes official government-imposed policies, not the terms of a private contract," and that " the ban on enacting or enforcing any law 'relating to rates, routes, or services' is most sensibly read, in light of the ADA' overarching deregulatory purpose, to mean 'states may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier.'" *Id.* at 229 n. 5, 115 S.Ct. at 824 n. 5, 130 L.Ed.2d at 726. The Court was not persuaded by the Airline's argument that the word, "law" should be read as including "laws that govern the obligations imposed by contract." *Id.* n. 6.

Rejecting the Airline's argument that the Department of Transportation is the only competent monitor of its undertakings, the Court reiterated the point that preemption applied to official government-imposed policies, pointing out that

> "The ADA's preemption clause, § 1305(a)(1), read together with the FAA's saving clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement."

Id. at 232-33, 115 S.Ct. at 826, 130 L.Ed.2d at 728 (footnote omitted). Finally, the Court considered the argument that the Court's preemption position did not save the plaintiffs' claims because those claims "inescapably depend on state policies that are independent of the parties' intent," *Id.* at 233-34, 115 S.Ct. at 826, 130 L.Ed.2d at 728-729, and that to reach the merits of the claims, the state court must first invalidate or limit the airline's express reservation to change the program rules contained in the program contracts. Significantly, it responded:

> "American's argument is unpersuasive, for it assumes the answer to the very contract construction issue on which plaintiffs' claims turn: Did American, by contract, reserve the right to change the value of already accumulated mileage credits, or only to change the rules governing credits earned from and after the date of the change? See Brief for Respondents 5 (plaintiffs recognize that American 'reserved the right to restrict, suspend, or otherwise alter aspects of the Program prospectively,' but maintain that American 'never reserved the right to retroactively diminish the value of the credits previously

> minish the value of the credits previously earned by members'). That question of contract interpretation has not yet had a full airing, and we intimate no view on its resolution."

Id. at 234, 115 S.Ct. at 826, 130 L.Ed.2d at 729.

For cases holding that undertakings voluntarily assumed and reflected in private contracts and agreements, *see Volt Info. Scis. v. Bd. of Trs.,* 489 U.S. 468, 479, 109 S.Ct. 1248, 1255-56, 103 L.Ed.2d 488, 500 (1989); *Ass'n of Int'l Auto Mfrs. v. Comm'r, Mass. Dep't of Envtl. Prot.,* 208 F.3d 1, 7-8 (1st Cir.2000); *ProCd, Inc. v. Zeidenberg,* 86 F.3d 1447, 1454-1455 (7th Cir.1996); *Cent. States Health & Welfare Fund v. Pathology Labs.,* 71 F.3d 1251, 1254-1255 (7th Cir.1995); *Martin v. Ford Motor Co.,* 914 F.Supp. 1449, 1454 (S.D.Tex.1996); *Kawamata Farms, Inc. v. United Agric. Prods.,* 86 Hawai'i 214, 948 P.2d 1055, 1080 (Haw.1997); *Wallace v. Parks Corp.,* 212 A.D.2d 132, 629 N.Y.S.2d 570, 574 (1995).

Noting that the court stated that "the parties could not elect to have state law govern over federal law," *Chaires,* 131 Md.App. at 79, 748 A.2d 34 (Footnote Omitted), which they interpret as a resolution of the question whether a contractual choice-of-law provision is preempted by federal regulations intended to occupy the field at issue, the appellees maintain, as we have seen, that *Chaires* is dispositive of the issue presented in this case. They assert further that it is consistent with all of the federal authorities on that point, citing *Fidelity Federal Savings and Loan Assoc., et. al. v. de la Cuesta, et al.,* 458 U.S. 141, 152-153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664, 674-675; *Brown v. Investors Mortgage Co.,* 121 F.3d 472, 476 (9th Cir.1997); *Atkinson v. Gen. Elec. Credit Corp.,* 866 F.2d 396, 398 (11th Cir.), *cert. denied,* 493 U.S. 815, 110 S.Ct.

64, 107 L.Ed.2d 31 (1989); *Fantastic Fakes, Inc. v. Pickwick Int'l, Inc.*, 661 F.2d 479, 483 (5th Cir.1981); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293-94 (3rd Cir.), *cert. denied*, 534 U.S. 1020, 122 S.Ct. 545, 151 L.Ed.2d 423 (2001); *Jones v. U.S. Fid. & Guar. Co.*, No. 90-5005, 1992 WL 202327, at 4, 1992 U.S. Dist. Lexis 12303, at *10 (E.D.La.1992).

The appellees argue that *Wolens* does not mandate the result that the appellants urge and, in fact, is really inapposite. Characterizing the *Wolens* holding, consistent with *Smith v. Comair, Inc.*, 134 F.3d 254, 258 (4th Cir.1998) ("Wolens recognized that state contract claims escape preemption only when courts would be confined to the terms of the parties' agreement."); *Breitling U.S.A., Inc. v. Fed. Express Corp.*, 45 F.Supp.2d 179, 184 (D.Conn.1999) ("In considering whether a breach of contract action survives [] preemption, a reviewing court is restricted to the actual terms of a party's bargain."),[11]

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[11] *See also Stone v. Continental Airlines, Inc.*, 905 F.Supp. 823, 826 (D.Haw.1995); *Lyn-Lea Travel Corp. v. American Airlines*, 283 F.3d 282, 286-90 (5th Cir.2002) (holding plaintiff's affirmative state law claims, tortious interference with business relationships, breach of contract, fraud, and violations of the Texas Deceptive Trade Practices Act, preempted by the ADA, but holding its affirmative defense of fraudulent inducement not preempted). Explaining the preemption decision, the court said:

> "Lyn-Lea's claims for affirmative relief have a significant relationship to the economic aspects of the airline industry. Lyn-Lea asserts that (1) American intentionally interfered with its business relationships with four customers and an employee, luring the customers away with discounted fares; and (2) American acted fraudulently and deceptively while negotiating the Sabre CRS agreement with Lyn-Lea. The first claim involves American's dealings with customers,

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cases applying it, as being "that claims based on state law or policies external to a contract, as opposed to the express terms of the contract, are preempted by governing federal law," they emphasize that the appellants' claims are premised wholly on the terms of Subtitle 9, "all of which are external to the Cardholder Agreement itself." The appellees conclude, therefore, that the claims are preempted, even under *Wolens*.

Chaires is not dispositive of the case *sub judice*. To be sure, the choice of law provision at the center of the Court of Special Appeals's analysis, although conceded by the parties to be ambiguous, is quite similar to the provision under review in this case:

> "This loan transaction is governed by Title 12, Subtitle 10 of the Commercial Law Article of the Annotated Code of Maryland."

In addition, the FNMA/FHLMC uniform instruments (deeds of trust) in that case indicated that "[l]oans are originated under Title 12, subtitle 10 of the Commercial Law Article of the Maryland Code." Relying on this language from the loan documents and certain letters written to the Maryland Commission by Chevy Chase, *Chaires*, 131 Md.App. at 79, 748 A.2d at 42, the appellants in that case argued that the appellees in that case "'elected' Maryland law and waived federal protection." *Id.* Also, they challenged the trial court's construction of the choice

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while the second relates to enforceability of the Lyn-Lea contract. In other words, by its first claim, Lyn-Lea is seeking the application of Texas common law in a way that would regulate American's pricing policies, commission structure and reservation practices." *Id.* at 287.

of law provision, asserting that, being ambiguous, it "should be interpreted by the intent of the parties." *Id.* The intermediate appellate court rejected these arguments. Relying on the provisions of 12 C.F.R. § 560.2 providing that the regulations occupied the entire field of lending and "are to be the governing law for certain activities, including the charging of fees, by federal institutions," *Chaires,* 131 Md.App. at 79, 748 A.2d 34, that court held: "[c]ontrary to appellants' argument that appellees elected Maryland law over federal law, the parties could not elect to have state law govern over federal law." *Id.* It then concluded, "upon careful examination," *id.* at 83, 748 A.2d at 44-45, of the documents on which the appellants relied to support their argument that the appellees "elected Maryland law over federal law," *id.,*

> "The cited deed language, as well as the September 6, 1990 letter, simply indicate that appellees were electing to have the Maryland law govern the non-regulated portions of the contract. Although appellees could have utilized a more general choice of law language in the documents and letters, appellees did not, as they could not, elect state law over federal law for all aspects of the loan contract."

Id. at 85, 748 A.2d. at 45-46.

Whether the appellants' claims are preempted and whether the appellees contracted to comply with Subtitle 9 are separate and different questions, requiring different analyses. The former is a defense requiring an analysis of federal law and the determination of the impact the relationship of the parties has on the ability of that law to fulfill its intended goal. The latter involves contract interpretation, discerning the parties' intent, either actual

or presumed. Contract interpretation, unlike the question of federal preemption, is a matter of state law. *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 474, 109 S.Ct. 1248, 1253, 103 L.Ed.2d 488, 497 (1989) ("the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review").[12] The appellants point out, accurately:

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[12] Maryland has long adhered to the objective law of contract interpretation and construction. *Taylor v. NationsBank*, 365 Md. 166, 178, 776 A.2d 645, 653 (2001); *Wells v. Chevy Chase Bank, F.S.B.*, 363 Md. 232, 250-51, 768 A.2d 620, 629-31 (2001); *Adloo v. H.T. Brown Real Estate, Inc.*, 344 Md. 254, 266, 686 A.2d 298, 304 (1996). We explained this principle in *Taylor, supra*, as follows:

> "A court construing an agreement under this test must first determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated. In addition, when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed. In these circumstances, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant. Consequently, the clear and unambiguous language of an agreement will not give away [sic] to what the parties thought that the agreement meant or intended it to mean."

365 Md. at 178-179, 776 A.2d at 653 (citing *General Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261, 492 A.2d 1306, 1310 (1985). Moreover, "whether a contract is ambiguous is ordinarily determined by the court as a question of law." *Calomiris v. Woods*, 353 Md. 425, 434, 727 A.2d 358, 362, citing *State Highway Admin. v. Bramble*, 351 Md. 226, 239, 717 A.2d 943, 949 (1998). *See also JBG/Twinbrook Metro Ltd. v. Wheeler*, 346 Md. 601, 625, 697 A.2d 898, 911 (1997) ("The interpretation of a written contract is ordinarily a question of law for the court."); *Suburban Hospital v. Dwiggins*, 324 Md. 294, 306, 596 A.2d 1069, 1075 (1991), quoting *Gordy v. Ocean Park, Inc.*, 218 Md. 52, 60, 145 A.2d 273, 277 (1958) (" 'As a general rule, the construction or interpretation of all

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> "Federal preemption is a defense that argues that even if plaintiffs' state law contract claims are correct – i.e. even if Chevy Chase had promised to follow "subtitle 9 of the Maryland Commercial Code" with respect to the notice it would give cardholders of amendments, and even if it broke that promise – federal law bars those claims. The contract interpretation issue, by contrast, raises the question of whether or not the language of the contract specifying Subtitle 9 requires Chevy Chase to comply with the credit card amendment provisions of Subtitle 9."

Although purporting to decide the issue on preemption grounds, at bottom, *Chaires* was decided on contract interpretation principles. To be sure, the Court of Special Appeals is correct, where there is a conflict between federal and state law or where federal regulations preempt a field, state law may not be elected over federal law in that field. Here, however, the court acknowledged that 12 C.F.R. § 560.2(c) excludes some state laws from preemption and that it was reasonable for the parties in that case to include a choice of law provision. *Chaires,* 131 Md.App. at 83, 748 A.2d at 44-45. But rather than addressing the preemption issue directly, the court analyzed the parties' agreement, including extraneous documents, and decided

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written instruments is [initially] a question of law for the court. . . . '"); *Rothman v. Silver,* 245 Md. 292, 296, 226 A.2d 308, 310 (1967) ("If a written contract is susceptible of a clear, unambiguous and definite understanding, . . . its construction is for the court to determine."). Because the determination of ambiguity is a question of law, not fact, the determination is subject to a de novo review by appellate courts. *Calomiris, supra,* 353 Md. at 434, 727 A.2d at 362.

what the appellees in that case intended:[13] "it appears that the appellees were not attempting to opt for Maryland law over federal law, but were attempting to include a choice of law provision to govern the areas not preempted by the federal regulations."

Moreover, by emphasizing that the parties could not "elect to have state law govern *over* federal law," the court suggests that there was a conflict between federal and state law. Where that occurs, preemption in favor of the federal law necessarily follows. *See de la Cuesta,* 458 U.S. at 152, 102 S.Ct. at 3022, 73 L.Ed.2d at 675. In this case, as the appellants point out, "[t]here is no conflicting federal law for Chevy Chase to have selected Subtitle 9 'over.'" *See Williams v. First Gov't Mort. and Investors Corp.,* 176 F.3d 497, 500 (1999), in which the D.C. Circuit held that the federal Truth in Lending Act did not preempt the District of Columbia Consumer Protection Procedures Act, noting that

> "Nothing in TILA or its legislative history suggests that Congress intended the Act's disclosure regime to provide the maximum protection to which borrowers are entitled nationwide; states remain free to impose greater protections for borrowers. First Government has identified no way in which the CPPA would defeat TILA's purposes, nor has it suggested how joint applicability of the two statutes would subject it to conflicting obligations."

Id. at 500. The appellees' response, that

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[13] We do not address whether the Court of Specials Appeals applied the law appropriately.

> "TILA and its implementing regulations establish a uniform federal scheme for disclosure of credit terms, applicable to all creditors including federal savings associations, and OTS has expressly precluded any state regulation of such disclosures insofar as federal savings associations like Chevy Chase are concerned,"

is not persuasive. It relies only on 12 C.F.R. § 560.2(a) and fails to take account of the exemption in § (c).

The other cases the appellees cite are no more persuasive. In *de la Cuesta,* unlike in this case, there was direct conflict between federal regulations permitting due-on-sale clauses in mortgage agreements and restrictions placed by the California Supreme Court on the exercise of the clauses, which was resolved in favor of preemption. 458 U.S. at 154-56, 102 S.Ct. at 3023-3024, 73 L.Ed.2d at 675-677. In *Brown v. Investors Mortgage Co., supra,* 121 F.3d 472, and *Atkinson v. Gen. Elec. Credit Corp., supra,* 866 F.2d 396, the court rejected the argument that a general choice of laws provision was effective to avoid the preemptive effect of Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) when the agreement otherwise indicated the contrary intent. In *Brown,* the court commented:

> "This language does not address federal law or the relation between state and federal law. The fact that the parties chose to apply the laws of Washington, rather than the laws of another state, does not mean the parties decided that federal law should not apply."

121 F.3d at 476. In *Atkinson,* to the court, it was "readily apparent that the parties intended that DIDMCA apply." 866 F.2d at 398.

Fantastic Fakes, Inc. v. Pickwick Int'l, Inc., supra, 661 F.2d 479, 483 does not directly involve the question of preemption. Thus, the statement to which the appellees refer, that "[a] choice of law provision, therefore, merely designates the state whose law is to be applied to the extent its use is not preempted by nor contrary to the policies of the," 661 F.2d at 483, applicable federal law, has little relevance to this discussion. It is significant that, in that case, the court engaged in extensive contract interpretation. *Id.* at 483-84. Neither is *Roadway Package Sys., Inc. v. Kayser, supra,* 257 F.3d 287, 293-94 apposite. There, the court held that contracting parties may opt out of the FAA's default vacatur standards and fashion their own. 257 F.3d at 288. It was in this context that the court stated that the generic choice-of-law clause, indicating that the agreement in that case "shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania," "sheds little, if any, light on the parties' intent," and thus rejected Kayser's argument that it should be "read as expressing a desire to opt out of the FAA's default regime and to incorporate arbitration rules borrowed from Pennsylvania law." *Id.* It is significant that the court characterized the issue as simply a matter of contract construction, *id.*, "not one of choice-of-law or preemption." *Id.* at 294. It is also significant that the court acknowledged that a different result would have been appropriate had the parties agreed that "any controversy shall be settled by arbitration in accordance with the terms of the Pennsylvania Uniform Arbitration Act." *Id.* at 297.

Finally *Jones v. U.S. Fid. & Guar. Co., supra,* No. 90-5005, 1992 WL 202327, 1992 U.S. Dist. Lexis 12303 is inapposite. It involved the Employment Retirement

Income Security Act, 29 U.S.C. § 1144(a) (ERISA), a "deliberately expansive" statute designed to make regulation of employee benefit plans an exclusively federal concern. *Hansen v. Continental Ins. Co.,* 940 F.2d 971, 979 (5th Cir.1991), citing *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987). Thus, the statute expressly preempts state law where it relates to any ERISA Plan.[14] *See Degan v. Ford Motor Co.,* 869 F.2d 889, 893 (5th Cir.1989) (all "common law contract and tort claims based upon laws of general application, that is, not specifically related to insurance or employee severance or discrimination are preempted by ERISA.").

Despite its protestations to the contrary,[15] implicit in the appellees' *Wolens* argument is the notion that, in contracts where preemption is an issue, even though federal law may exempt contracts from preemption, all of the terms of the parties' contract must be set forth in the contract, none of the principal provisions may be supplied by reference. They read the passage from *Wolens,* prohibiting "enlargement or enhancement [of the parties' bargain]

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[14] 29 U.S.C. § 1144(a) provides:

> "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan[.]"

[15] The appellees state that they "never contended that the narrow exception in 12 C.F.R. § 560.2(c) is limited to contractual provisions that mimic[ ] state law, rather than incorporating state law by reference. On the other hand, the appellees characterize the Wolens Court as "distinguish[ing] . . . between claims that are based on the express terms of the contract, which are not preempted and claims that involve "enlargement or enhancement based on state laws or policies external to the agreement," which are preempted.

based on state laws or policies external to the agreement" to mean that, as the appellants put it, "federal law does not preempt a private party from undertaking obligations spelled out in a contract, but does preempt a party from undertaking contractual obligations by reference in a contract to some body of rules 'external' to the contract." Not only does such a distinction make absolutely no sense, it fails to distinguish between the preemption issue and the contract interpretation issue. The latter is, as we have seen, a question of state law. Maryland law recognizes that parties may agree to define their rights and obligations by reference to documents or rules external to the contract. *Kirby & McGuire, Inc. v. Board of Education,* 210 Md. 383, 385, 123 A.2d 606, 608 (1956) ("It is clear, too, that by virtue of the incorporation by reference of the contract into the bond and of the other documents into the contract, the bond and all of the documents are to be read and construed together, as if set forth in the bond."); *Ray v. William G. Eurice & Bros., Inc.,* 201 Md. 115, 128, 93 A.2d 272, 279 (1952) ("The lower court seemingly attached significance to the fact that the plans and specifications were not physically fastened to the contract document which was executed, although it specifically and explicitly referred to both. In this situation physical attachment has not the significance so attributed to it. It is settled that where a writing refers to another document that other document, or so much of it as is referred to, is to be interpreted as part of the writing."). *See Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P'ship,* 346 Md. 122, 128, 695 A.2d 153 (1997).

The *Wolens* Court drew no such distinction. And the courts applying *Wolens* do not draw such a distinction either. The distinction that the Court drew was between

what is required, as a matter of law, without any necessity for a specific agreement to that effect, and what a party voluntarily agrees to do, without regard to what the law might require in the absence of that agreement. It is the law or policy that applies to any agreement made by parties that is external to, not a part of, the parties' bargain, not the fact that terms of the agreement are supplied by reference. The cases applying *Wolens,* including those on which the appellees rely, prove the point.

In *Breitling U.S.A., Inc. v. Fed. Express Corp., supra.,* 45 F.Supp.2d 179, Breitling sought to recover damages under an agreement providing that FedEx was liable only for its own negligence, by interposing the doctrine of waiver. The court held, "because Breitling seeks to impose common law principles and policies on the agreement between the two parties, Breitling's claims are preempted by the ADA." *Id.* at 183-84. The common law principle was not included in the contract, but would ordinarily have been applicable to the contract as a matter of law. Similarly, in *Smith v. Comair, Inc., supra,* 134 F.3d 254, a passenger's breach of contract action against Comair and Delta Airlines for refusal to allow him to board his flight was held to be preempted. The court was persuaded by the effect of Comair's federal defenses on the preemption question, noting "[b]ecause Comair invokes defenses provided by federal law, Smith's contract claim can only be adjudicated by reference to law and policies external to the parties' bargain and, therefore, is preempted under the ADA." *Id.* at 258. It also pointed to the fact that the action implicated the airline's discretion and/or duty under federal law, *id.,* and the practical effect on federal law: "If passengers could challenge airlines' boarding procedures under general contract claims alleging failure to transport,

we would allow the fifty states to regulate an area of unique federal concern – airlines' boarding practices." *Id.* at 258-59, citing *Hodges v. Delta Airlines, Inc.,* 44 F.3d 334, 339 (5th Cir.1995) (en banc).

To like effect, *see, Travel All Over the World, Inc. v. Kingdom of Saudi Arabia,* 73 F.3d 1423 (7th Cir.1996), in which the court, applying *Wolens,* permitted a contract action to proceed, *id.* at 1432, but also held the claim for punitive damages to be preempted, opining, "Rather than merely holding parties to the terms of a bargain, punitive damages represent an 'enlargement or enhancement [of the bargain] based on state laws or policies external to the agreement.'" *Id.* at 1432 n. 8. *Deerskin Trading Post, Inc. v. United Parcel Service of America,* 972 F.Supp. 665, 672-73 (N.D.Ga.1997) (breach of contract claim not preempted but prayer for punitive damages and injunctive relief is, because such relief goes beyond the parties' agreement); *Richmond Capital Corp. v. Federal Express Corp.,* 29 F.Supp.2d. 737, 740 (M.D.La.1998); *Manning v. Skywest Airlines,* 946 F.Supp. 767, 769 (C.D.Cal.1996) (although involving a tort action, the analysis is supportive of non-preemption and indeed non preemption was held).

Nor are the appellees correct "that the requirements of Subtitle 9 can be imposed on Chevy Chase." It is true that Subtitle 9 is a state law, as defined by 12 C.F.R. § 560.2(a) and, thus, falls within the category of state imposed obligations that regulation preempts. It is not true that Subtitle 9 is required by a state statutory regulation, ruling, order or judicial decision to be complied with in this case. It is in this case only because the agreement between the parties refer to it and do so in the context of the notice to be given in the event that the agreement is amended. Indeed, that agreement was prepared by Chevy

Chase; it was not imposed on Chevy Chase as a matter of law.

To be sure, the disputed contract provision has been included, as we have seen, in the section of the Cardholder Agreement dealing with "Governing Law," rather than the section covering amendments. In addition, it refers both to Subtitle 9 and "applicable federal law. Contract interpretation will determine what the agreement means, the intent of the parties in entering into this agreement, Chevy Chase's intent in drafting it and, in particular, the scope and extent of the parties' obligations and rights under it. This will require application of the familiar canons of construction, to which we earlier referred. *Supra* at n. 12.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE APPELLEES.

RAKER, Judge, dissenting.

I respectfully dissent. I would affirm the judgment of the Circuit Court for Baltimore City on the grounds set forth by the trial judge, namely, that all of the plaintiff's claims are preempted by federal law.

On the question of whether this action is exempt from federal preemption, the Circuit Court stated the following:

> "This court is convinced that to permit [appellants] to thwart the admitted preemption of the relevant law solely because of a general reference to Maryland law, flies in the face of common sense and contract interpretation. When the parties mentioned Subtitle 9 of the Maryland Code

> and 'applicable federal law' as governing law, they did not incorporate the protections of a Maryland regulatory scheme into the agreement. Had they meant to do that, they could have done so in clear-cut terms. As the *Chaires* case makes clear, they could not waive federal preemption and could only have intended that state law apply as 'governing law' should 'federal law' not apply. There is no basis for claiming that they entered into a private agreement incorporating a complex and detailed state regulatory scheme."

The Circuit Court got it right. *See Chaires v. Chevy Chase Bank,* 131 Md.App. 64, 748 A.2d 34 (2000); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982).

APPENDIX B

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

Dale Wells, et. al.	)	
	)	
Plaintiffs	)	**Civil No.**
v.	)	**C-99-000202**
	)	
Chevy Chase Bank, F.S.B., et. al.	)	
	)	
Defendants	)	

ORDER REGARDING DEFENDANTS' MOTION TO DISMISS

Defendants, Chevy Chase Bank, F.S.B. ("Chevy Chase") and First USA Bank, N.A. ("First USA") move this Court to dismiss Plaintiffs First Amended Complaint contending that state laws upon which these claims are based are preempted by federal law.

BACKGROUND AND FACTS

The Plaintiff held credit cards issued by Chevy Chase, which subsequently sold its credit card operations to First USA. These cards were held and used pursuant to contractual terms set forth in Chevy Chase's Cardholder Rules and Regulations and Notice of Cardholders Rights. ("Cardholder Agreement")

Plaintiff contends that Subtitle 9 of Title 12 of the Commercial Law Article of the Maryland Code ("Subtitle 9") was incorporated into the Cardholder Agreement by its "governing law" provision. They rely upon the notice

requirements of that subtitle to establish a breech of that agreement by the Defendants. The Plaintiffs case arises from the January, 1996 Chevy Chase decision to move its home office from Maryland to Virginia, and amend its choice of law provisions in the Cardholder Agreement from the law of Maryland to the law of Virginia.

It is alleged that the Defendants' then replaced the Maryland Agreement with a new one, which is referred to as the "Virginia Document." Under this document, many of the terms and conditions to which cardholders were held were no longer subject to limitations alleged to exist under the original cardholder agreement entered into when Chevy Chase's home office was the state of Maryland. Specifically, Plaintiffs point to the notice requirements of Maryland law, which they allege, were violated when Defendants changed from the Maryland Agreement to the Virginia Agreement. Without going in to detail unnecessarily, it is alleged by the Plaintiffs that they suffered financial loss as a result of changes in the terms and conditions of credit, which occurred subsequent to the Defendants' move to Virginia. Plaintiffs believe these changes are illegal because they were made without the notices required by Maryland law.

All parties agree that Subtitle 9, and the relevant notice requirements and protections are preempted by the Homeowners Loan Act ("HOLA") 12 U.S.C. Section 1463G and its implementing regulations. Pursuant to the adoption of HOLA, the Federal Office of Thrift Supervision, ("OTS") and its predecessor, the Federal Home Loan Bank Board ("The Bankboard") "adopted comprehensive rules and regulations concerning the powers and operations of every Federal Savings and Loan Association from its cradle to its corporate grave." ***California v. Coast Fed.***

Sav. And Loan Ass'n, 98F Sup 311, 316 (S.D. Cal. 1951). Accordingly, both sides agree that federal law preempts Maryland law regarding the notice that must be sent to a cardholder prior to the change of terms and conditions of a Cardholder Agreement. Regardless, Plaintiffs insist that the notice provisions of "Subtitle 9" may still be enforced. They base this claim on the allegation that the protections of Subtitle 9 were agreed to by the Plaintiffs and Chevy Chase and/or First USA, as a result of specific contractual language contained within the Cardholder Agreement in its "governing law" provision.

On these subjects the agreement states:

> **"Amendments – we may amend the terms of this Agreement in accordance with applicable law at any time. Also, we may at any time add new credit services, discontinue any credit services, or replace your card with another card."**

And with respect to notice, the Cardholder Agreement merely says:

> **"Notices – any notice that we want to give you will be considered given when we either deliver it to you personally or place it in the United States mail, postage prepaid, at your last address shown on our records. A notice given to any one of you is considered to be a notice to all of you."**

However, Plaintiffs believe that their cause of action can survive this Motion to Dismiss solely because of an additional paragraph contained within the Cardholder Agreement dealing with the issue of "governing law." On that subject the agreement specifically states:

Governing Law – This Agreement is made in Maryland. It is governed by Subtitle 9 of Title 12 of the Commercial Law Article of the Maryland Annotated Code and applicable federal laws.

Plaintiffs insist that this reference to Subtitle 9 of Title 12, as "governing law" incorporates within the Cardholder Agreement as a "private agreement" all the protections contained specifically within that Subtitle including the various requirements concerning notice which are the bases of this cause of action.

THE ISSUE

Does the reference in the "governing law" provision of the Cardholder Agreement to "Subtitle 9 . . . and applicable federal laws" incorporate Subtitle 9 as a private agreement between Cardholders and the Defendants which can be enforced despite the admitted preemption of Subtitle 9 by federal law?

DECISION

Analysis of this case begins with a discussion of *Chaires v. Chevy Chase Bank*, 131 Md. App. 64 (2000), a Court of Special Appeals decision dealing with the same issue of federal preemption. In that case, the Plaintiffs sued Chevy Chase alleging illegal conduct through charging of loan fees in excess of those permitted under Section 12-401 *et. seq.* of the Commercial Law Article. Just as in this case, Chevy Chase moved for Summary Judgment contending that federal law preempted state law violations. The Court of Special Appeals affirmed the trial court

decision granting Chevy Chase's Motion for Summary Judgment.

In *Chaires*, Plaintiffs opposed Chevy Chase's Motion of Summary Judgment arguing that the parties had elected that the transactions be controlled pursuant to Maryland law. This is an argument very similar to the assertion made by Plaintiffs in the case at bar. In that case, the Court of Special Appeals rejected this argument in sweeping terms stating:

> **"Contrary to appellant's argument that appellees elected Maryland law over federal law, the parties could not elect to have state law govern over federal law. The Code of Federal Regulations ("CFR"), 12CFR, Sec. 560.2 expressly provides that the federal regulations occupy the entire field of federal lending, and the federal regulations are to be the governing law for certain activities, including the charging of fees by federal institutions." 131 Md. App. 64, 79.**

In analyzing this issue the Court of Special Appeals stated:

> **"However, upon careful examination of these documents, it appears that the appellees were not attempting to opt for Maryland law over federal law, but were attempting to include a choice of law provisions to govern areas not preempted by federal regulations. The appellees could not and were not waiving any federal protections." 131 Md. App. 64 at 83.**

This analysis by the Court of Special Appeals could be applied with equal force to this case. This is particularly

evident since the paragraph that the Plaintiffs primarily rely upon deals with governing law. Significantly, this paragraph does not express the intent to incorporate into the agreement the detailed provisions and protections of Maryland law, but rather only to choose the applicable law, should federal law not apply.

In order to escape from the effects of federal preemption while acknowledging its breadth, the Plaintiffs contend that by referencing the Maryland law, the Defendants have entered into a voluntary undertaking to adhere to the specific requirements of Subtitle 9, which otherwise may not be applied as a result of federal preemption.

To support this contention the Plaintiffs rely heavily upon the holding of the Supreme Court in ***American Airlines Inc. v. Wolens***, 513 U.S. 219 (1995). That case involved claims that state law could properly be applied to support a lawsuit alleging various violations of "frequent flyer agreements" between federally regulated airlines and individual customers. There, the Supreme Court held "we do not read the Airline Deregulation Act's preemption clause; however, to shelter airlines from suits alleging no violation of state imposed obligations but seeking recovery solely for the airlines alleged breech of its own, *self imposed undertakings*." 515 U.S. 219, 228-229 (1995) (emphases added). In that case the "undertakings" involved were agreements with customers regarding the use of frequent flyer miles.

Plaintiffs contend that ***Wolens*** stands for the proposition that Chevy Chase could, through its contract, voluntarily agree to a variety of restrictions that could be interpreted as self imposed undertakings. Plaintiffs go on to argue that the governing law provisions of the Cardholders

Agreement amount to a self-imposed undertaking to incorporate into the agreement, the requirements of Maryland Law. These specifically include the various notice provisions upon which the Plaintiffs chiefly rely in making their claim in this case.

Plaintiffs reliance on the holding in ***American Airlines Inc. v. Wolens***, *et al*, is unsupported by an analysis of the holding in that case. There, the Supreme Court held that preemption did not preclude a lawsuit by customers attacking the retroactive modification of the terms and conditions under which Plaintiffs used previously earned "Frequent Flyer" benefits. The court held that such obligations were "self-imposed undertakings" and "privately ordered obligations" that did not "amount to a state's enactment or enforcement (of) any law, rule regulation, standard, or other provision having the force and effect of law." 513 U.S. 219, 228 (1995).

The logic of ***Wolens*** makes it plain that the Court was denying preemption based solely upon the fact that the frequent flyer agreements were not the result of any state's "enactment or enforcement [of] any law, rule or regulation." 513 U.S. 219, 229 (1995). They were clearly private undertakings. In contrast here Plaintiffs are unquestionably trying to enforce state-imposed laws and regulations. It is patently obvious that this is precisely what federal preemption was intended to preclude.

Consistent with this analysis is the view of OTS that 12 CFR Section 560.2(c) means that ". . . the purpose of paragraph (c) is to preserve the traditional infrastructure of basic state laws that undergird commercial transactions, *not to open the door to state regulations of lending by federal savings associations*. . . . For these purposes,

paragraph (c) is intended to be interpreted narrowly. *Any doubt should be resolved in favor of preemption.*" 61 Fed. Reg. 50951, 50966 (1996) (emphasis added).

This Court believes that it is both ingenious, and a trifle disingenuous, to admit that the specific state imposed notice restrictions are preempted by federal law, while at the same time contend that the general reference to Maryland law, as the governing law, specifically reincorporates into the Cardholder Agreement these provisions as private agreements. It seems both implausible and inconsistent with federal preemption to claim that a state regulatory scheme was agreed to between parties by the mere reference to Subtitle 9. This is a great deal beyond the scope of preserving the traditional infrastructure of state laws that undergird commercial transactions.

It is clear that the intent of federal regulations was to permit federal savings associations to operate under federal regulations free from regulatory obligations as imposed by the State. A review of Subtitle 9, of Article 12, makes it apparent that what is imposed therein is a state imposed regulatory scheme. A commonsensical review of those provisions finds them to be totally inconsistent with the suggestion that they are merely general principals of commercial law, which would not interfere with a federal regulatory scheme. Article 12 of the Maryland Code is described generally as "Credit Regulations" and Subtitle 9 is entitled "Credit Grantor Revolving Credit Provisions." They are a detailed regulatory scheme covering in minute detail the terms of credit and credit agreements.

This Court is convinced that to permit Plaintiffs to thwart the admitted preemption of the relevant law solely because of a general reference to Maryland law, flies in the

face of common sense and contract interpretation. When the parties mentioned Subtitle 9 of the Maryland Code and "applicable federal law" as governing law, they did not incorporate the protections of a Maryland regulatory scheme into the agreement. Had they meant to do that, they could have done so in clear-cut terms. As the ***Chaires*** case makes clear, they could not waive federal preemption and could only have intended that state law apply as "governing law" should "federal law" not apply. *Supra. p. 4.* There is no basis for claiming that they entered into a private agreement incorporating a complex and detailed state regulatory scheme.

Accordingly, this Court finds the state law basis for Plaintiffs claims are preempted by federal law and grants Defendant's Motion to Dismiss.

CONCLUSION

Therefore, for the aforementioned reasons, it is this 14 day of November 2001, **ORDERED** that the Defendant's Motion to Dismiss be **GRANTED**.

John M. Glynn
Judge
ORIGINAL SIGNATURE ON FILE
AT CLERK'S OFFICE

cc:

F. Paul Bland, Jr., Esq.
John T. Ward, Esq.
Michael P. Malakoff, Esq.
David J. Cynamon, Esq.

APPENDIX C

CONSTITUTION OF THE UNITED STATES
ARTICLE VI – DEBTS VALIDATED – SUPREME LAW OF LAND – OATH OF OFFICE
Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

UNITED STATES CODE ANNOTATED
TITLE 12. BANKS AND BANKING
CHAPTER 12 – SAVINGS ASSOCIATIONS
§ 1464. Federal savings associations

(a) In general

In order to provide thrift institutions for the deposit of funds and for the extension of credit for homes and other goods and services, the Director is authorized, under such regulations as the Director may prescribe –

(1) to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings associations (including Federal savings banks), and

(2) to issue charters therefor,

giving primary consideration of the best practices of thrift institutions in the United States. The lending and investment powers conferred by this section are intended to

encourage such institutions to provide credit for housing safely and soundly.

CODE OF FEDERAL REGULATIONS
TITLE 12 – BANKS AND BANKING
CHAPTER V – OFFICE OF THRIFT SUPERVISION, DEPARTMENT OF THE TREASURY
PART 560 – LENDING AND INVESTMENT
Current through November 21, 2003; 68 FR 65827

§ 560.2 Applicability of law.

(a) Occupation of field. Pursuant to sections 4(a) and 5(a) of the HOLA, 12 U.S.C. 1463(a), 1464(a), OTS is authorized to promulgate regulations that preempt state laws affecting the operations of federal savings associations when deemed appropriate to facilitate the safe and sound operation of federal savings associations, to enable federal savings associations to conduct their operations in accordance with the best practices of thrift institutions in the United States, or to further other purposes of the HOLA. To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section or § 560.110 of this part. For

purposes of this section, "state law" includes any state statute, regulation, ruling, order or judicial decision.

(b) Illustrative examples. Except as provided in § 560.110 of this part, the types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding:

(1) Licensing, registration, filings, or reports by creditors;

(2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements;

(3) Loan-to-value ratios;

(4) The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(5) Loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees;

(6) Escrow accounts, impound accounts, and similar accounts;

(7) Security property, including leaseholds;

(8) Access to and use of credit reports;

(9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants;

(10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;

(11) Disbursements and repayments;

(12) Usury and interest rate ceilings to the extent provided in 12 U.S.C. 1735f-7a and part 590 of this chapter and 12 U.S.C. 1463(g) and § 560.110 of this part; and

(13) Due-on-sale clauses to the extent provided in 12 U.S.C. 1701j-3 and part 591 of this chapter.

(c) State laws that are not preempted. State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:

(1) Contract and commercial law;

(2) Real property law;

(3) Homestead laws specified in 12 U.S.C. 1462a(f);

(4) Tort law;

(5) Criminal law; and

(6) Any other law that OTS, upon review, finds:

(i) Furthers a vital state interest; and

(ii) Either has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section.

ANNOTATED CODE OF MARYLAND
COMMERCIAL LAW
TITLE 12. CREDIT REGULATIONS
SUBTITLE 9 – CREDIT GRANTOR REVOLVING CREDIT PROVISIONS

§ 12-901. Definitions

(a) In this subtitle the following words have the meanings indicated.

(b)(1) "Credit grantor" means any individual, corporation, business trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity making a loan or other extension of credit under this subtitle which is incorporated, chartered, or licensed pursuant to State or federal law, the lending operations of which are subject to supervision, examination, and regulation by a State or federal agency or which is licensed under Title 12, Subtitle 4 of the Financial Institutions Article or is a retailer.

(2) "Credit grantor" includes:

(i) Any bank, trust company, depository institution, or savings bank having a branch in this State;

(ii) Any subsidiary of a bank holding company, as defined in the federal Bank Holding Company Act of 1956[1] as amended, which is domiciled, doing business,

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[1] 12 U.S.C.A. § 1841 et seq.

and offering a revolving credit plan involving the issuance of credit devices in this State; and

(iii) Any person who acquires or obtains the assignment of a revolving credit plan made under this subtitle.

(c) "Borrower" means a corporation, partnership, association, government or governmental subdivision or agency, trust, individual, or other entity receiving a loan or other extension of credit under this subtitle.

(d) "Consumer borrower" means an individual receiving a loan or other extension of credit under this subtitle for personal, household, or family purposes or an individual receiving a commercial loan or other extension of credit for any commercial purpose not in excess of $75,000, secured by residential real property.

(e) "Revolving credit plan" or "plan" means a plan that contemplates the extension of credit under an account governed by an agreement between a credit grantor and a borrower under which:

(1) The credit grantor permits the borrower and, if the agreement governing the plan permits, persons acting on behalf of or with authorization from the borrower to make purchases or obtain loans from time to time;

(2) The amounts of purchases and loans are charged to the borrower's account;

(3) The borrower is required to pay the credit grantor the amounts of all purchases and loans charged to the borrower's account under the plan but has the privilege of paying amounts due from time to time as agreed; and

(4) Interest or finance charges may be charged and collected by the credit grantor from time to time on the amounts due under the plan.

(f) "Purchase" means an extension of credit for a purchase of real or personal, tangible or intangible property, or an extension of credit for services, licenses, taxes, official fees, fines, private or governmental obligations, or any other thing of value, including a charitable contribution.

(g) "Loan" means a cash advance to be paid to or for the account of the borrower.

(h) "Credit device" means any card, plate, check, draft, identification code, or other means of identification contemplated by the agreement governing the plan.

(i)(1) "Outstanding unpaid indebtedness" means on any day the total amount of purchases and loans charged to the borrower's account under the plan which is outstanding and unpaid at the end of the day, after adding the aggregate amount of any new purchases and loans charged to the account that day and deducting the aggregate amount of any payments and credits applied to the account that day.

(2) If the agreement governing the plan permits, "outstanding unpaid indebtedness" may include the amount of any interest, finance charges, and additional charges, including late or delinquency charges, that have accrued in the account and are unpaid at the end of the day.

(j) "Nonconsumer borrower" means any borrower other than a consumer borrower.

(k) "Commercial loan" and "extension of credit for a commercial purpose" mean an extension of credit made:

(1) Solely to acquire an interest in or to carry on a business or commercial enterprise; or

(2) To any business or commercial organization.

(l) "Residential real property" means owner-occupied real property having a dwelling on it designated principally as a residence with accommodations for not more than four families.

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§ 12-902. Authorized practices

(a) Any credit grantor may, subject to the other provisions of this subtitle:

(1) Offer and extend credit under a revolving credit plan to a borrower and in that connection charge and collect the interest, finance charges, and other charges permitted by this subtitle;

(2)(i) Take any security as collateral as may be acceptable to the credit grantor.

(ii) If real property is taken as security, the credit grantor shall record the entire line of credit when the credit plan is established.

(b) Without limiting subsection (a) of this section, credit may be extended under a revolving credit plan by a credit grantor's acquisition of obligations arising out of the honoring of a credit device made available to a borrower under a plan, whether directly or indirectly by means of telephone, point of sale terminal, automated teller machine or other electronic or similar device, or through the mails, by:

(1) A merchant;

(2) A bank or other financial institution chartered or organized under the laws of this or any other state, the District of Columbia, the United States or any district,

territory, or possession of the United States, or any foreign country;

(3) Any other person or entity; or

(4) A government or governmental subdivision or agency.

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§ 12-903. Collecting interest or finance charges

(a)(1) A credit grantor may charge and collect interest or finance charges under the plan on the outstanding unpaid indebtedness in the borrower's account under the plan at any daily, weekly, monthly, annual, or other periodic percentage rate as the agreement governing the plan provides, if the effective rate of simple interest does not exceed 24 percent per year. The rate of interest chargeable on a plan must be expressed in the agreement as a simple interest rate or rates.

(2) The repayment terms for a plan extended to a consumer borrower may not include a provision under which the consumer borrower may be required to pay a balloon payment at maturity. However, the adjustment of payment amounts, due to fluctuations in unpaid balance or rate of interest, may not be deemed to result in a balloon payment.

(3) If the plan is secured by a lien on residential real property, the credit grantor may, in addition to the periodic percentage rate charge authorized under subsection (a)(1) of this section, charge and collect at the time the plan is entered into by the borrower points, loan origination fees, loan discount fees, and similar fees, provided that:

(i) All such fees, when combined with any finder's fee imposed by a mortgage broker under § 12-804 of

this title, may not exceed 10 percent of the maximum amount of credit made available to the borrower under the plan;

(ii) The documents evidencing the plan specifically enumerate any such fees;

(iii) The borrower agrees in writing to pay those fees; and

(iv) The fees are disclosed to the borrower in accordance with the federal Truth in Lending Act[1]

(b) With respect to a revolving credit plan of a consumer borrower, interest may be calculated on an amount not in excess of the average of the outstanding unpaid indebtedness for the applicable billing period, determined by dividing the total of the amounts of outstanding unpaid indebtedness for each day in the applicable billing period by the number of days in the billing period, or on an amount calculated by another balance computation method specified in the agreement.

(c) If the applicable periodic percentage rate under the agreement governing the plan is monthly, a billing period shall be deemed to be monthly if the last day of each billing period is on the same day of each month or does not vary by more than 4 days.

(d)(1) Notwithstanding subsections (a) and (b) of this section:

(i) If the outstanding balance of purchase obligations under an open-end credit plan is paid in full

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[1] 15 U.S.C.A. § 1601 et seq.

within 25 days after the end of a prior billing period, a finance charge or interest may not be imposed on a consumer borrower with respect to such balance for the period from the end of the prior billing period to the date of the payment in full; and

(ii) If there is no purchase balance at the beginning of a current billing period or if full payment of an outstanding balance from a prior billing period is made under subparagraph (i) of this paragraph within 25 days after the end of the prior billing period, a finance charge or interest may not be imposed on a consumer borrower with respect to any purchase obligation added to the account during the current billing period from the date of purchase to the end of the current billing period.

(2) Notwithstanding paragraph (1) of this subsection, if the agreement governing a plan so provides, a finance charge or interest may be imposed from the date of purchase, if the agreement does not provide any charge permitted by § 12-905(a) of this subtitle.

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§ 12-904. Variable rates

(a) If the agreement governing the revolving credit plan so provides, the periodic percentage rate of interest or finance charges under the plan may vary in accordance with an index or formula that:

(1) Is made readily available to and verifiable by the borrower;

(2) Is beyond the control of the credit grantor; and

(3) May be within the control of the borrower.

(b) The periodic percentage rate, as varied, may be made applicable to all outstanding unpaid indebtedness on or

after the effective date of the variation, including any indebtedness arising out of purchases made or loans obtained prior to the variation.

(c) The periodic percentage rate, as varied, may not exceed the maximum rate permitted pursuant to § 12-903(a)(1) of this subtitle.

(d) If a formula used under subsection (a)(3) of this section measures credit risk, the periodic percentage rate of interest or finance charges:

(1) Shall be lower for any consumer borrower measured as more credit worthy under the formula; and

(2) If the formula considers delinquency or arrearages, may not be raised unless a consumer borrower is at least 2 months in arrears in payment.

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§ 12-905. Additional fees or charges authorized

(a) With respect to an unsecured open end credit plan, fees or charges may not be imposed on a consumer borrower in addition to interest or finance charges as permitted by this subtitle, except as follows:

(1) If the plan is offered by a seller of goods or services, or both, and may be used only for the purchase or lease of the seller's goods and services, the seller may charge one of the following fees:

(i) An annual charge in any amount the agreement provides for the privileges made available to the consumer borrower under the plan;

(ii) A transaction charge or charges in such amount or amounts as the agreement may provide for each separate purchase under the plan; or

(iii) A minimum charge for each scheduled billing period under the plan during any portion of which there is an outstanding unpaid indebtedness under the plan.

(2) If the plan is offered by any other credit grantor, the credit grantor may impose any or all of the following fees:

(i) An annual charge in any amount the agreement provides for the privileges made available to the consumer borrower under the plan;

(ii) A transaction charge or charges in such amount or amounts as the agreement may provide for each separate purchase or loan under the plan; and

(iii) A minimum charge for each scheduled billing period under the plan during any portion of which there is an outstanding unpaid indebtedness under the plan.

(3) Notwithstanding the provisions of paragraph (2) of this subsection, if the credit agreement provides, a credit union may make loans or extend credit to its members incorporating the same terms and conditions as a federal credit union is permitted under federal law and regulations relating to:

(i) An over the limit fee assessed on a credit card account; and

(ii) Fees for ancillary and administrative services requested by the member, including:

1. Researching account records;

2. Providing duplicate statements and other documents; and

3. Expedited issuance of a duplicate or original credit card or device.

(b) Except as provided in subsection (f) of this section, with respect to a secured open end credit plan, fees or charges may not be imposed on a consumer borrower in addition to interest or finance charges except for actual and verifiable fees incurred by the credit grantor and not retained by the credit grantor for the following:

(1) Attorney's fees for services rendered in connection with the preparation, closing, or disbursement of the loan;

(2) Any expense, tax, or charge paid to a governmental agency;

(3) Examination of title, appraisal, or other costs necessary or appropriate to the security of the loan; and

(4) Premiums for any insurance coverage permitted under this subtitle.

(c) If a plan is established for a consumer borrower, a fee or charge may not be charged or collected unless the agreement concerning the plan permits the fee to be charged.

(d) If a plan is established for a nonconsumer borrower, the nonconsumer borrower and credit grantor may agree upon any terms concerning charges and fees.

(e) For purposes of this section, the additional charges listed in subsections (a), (b), and (f) of this section are not interest or finance charges with respect to a plan.

(f)(1) Subject to the provisions of paragraphs (2) through (8) of this subsection, a credit grantor of an open end credit

plan that is secured by a deposit, savings, passbook, or other similar account or certificate of deposit may impose:

(i) An application fee not to exceed $35; and

(ii) An annual charge not to exceed $35 for the privileges made available to the consumer borrower under the plan.

(2) If an application to the plan is approved, the credit grantor shall credit the application fee:

(i) To the initial annual charge; and

(ii) If there is no annual charge, to the interest or finance charges under the plan.

(3) If an application to the plan is rejected, the credit grantor shall return the application fee to the applicant.

(4) Within 45 days after the receipt of the application, the credit grantor shall:

(i) Accept the application; or

(ii) Reject the application and return the application fee to the applicant.

(5) Any such plan shall have a credit limit of no less than the amount of the deposit, savings, passbook, or other similar account or certificate of deposit required as security.

(6) The application shall state the amount of:

(i) The minimum required security; and

(ii) The application fee.

(7) The agreement shall state the amount of the annual charge.

(8) If an annual charge is imposed, the credit grantor shall pay interest on the deposit, savings, passbook, or other similar account or certificate of deposit required as security in the greater of:

(i) A rate of 4 percent per annum simple interest; or

(ii) The rate of interest regularly paid on regular passbook savings accounts by the lending institution that issued the deposit, savings, passbook, or other similar account or certificate of deposit required as security.

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§ 12-906. Different terms, loans and purchases

(a) If the agreement governing a revolving credit plan permitting the borrower to obtain both loans and purchases so provides, a credit grantor may impose different terms on the indebtedness arising out of purchases than to the indebtedness arising out of loans.

(b) Subsection (a) of this section applies to all terms, including:

(1) The terms governing the periodic percentage rate used to calculate interest or finance charges;

(2) The method of computing the outstanding unpaid indebtedness to which the periodic percentage rate is applied;

(3) The amounts of other charges; and

(4) The applicable repayment schedule.

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§ 12-907. Credit tied to transaction account

(a) If credit under a revolving credit plan is offered and extended by a credit grantor which is a depository institution in connection with a demand deposit account or other transaction account maintained by the borrower with the credit grantor under an agreement or arrangement where the credit grantor agrees to honor checks, drafts, or other debits to the account by making extensions of credit to the borrower under a revolving credit plan, any charges customarily imposed by the credit grantor under the terms governing the account in the absence of any associated revolving credit plan may continue to be imposed on the account without specific reference or incorporation in the agreement governing the revolving credit plan.

(b) The account charges referred to in subsection (a) of this section include:

(1) Check charges;

(2) Monthly maintenance charges;

(3) Checkbook charges;

(4) Charges for checks drawn in excess of an available line of credit; or

(5) Any similar charges.

(c) The amount of any charge imposed on the account may be charged to the account under the plan as a loan and may be included in the outstanding unpaid indebtedness under the terms of the agreement governing the revolving credit plan, to the extent the balance in the demand deposit or other transaction account is insufficient to pay the charge.

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§ 12-908. Deferrals

A credit grantor may at any time allow a borrower under a revolving credit plan to defer scheduled payments and charge the borrower a deferral charge agreed to by the credit grantor and the borrower.

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§ 12-909. Insurance

(a) In connection with a plan established for a consumer borrower:

(1) The purchase of credit life, credit accident and health, credit disability, involuntary unemployment benefit, and similar coverages is optional with the consumer borrower; and

(2) Subject to § 12-909.1 of this subtitle, the purchase of property insurance, title insurance, and credit loss insurance from an insurer of the borrower's choice may be required if the loan is secured.

(b) The provisions of this section do not alter or modify rights, privileges, or restrictions heretofore existing between the credit grantor and a nonconsumer borrower.

(c) Premiums for any insurance coverage permitted by this section are not interest or finance charges under the plan.

(d) The offering and placement of insurance under this section shall be subject to the provisions of the Insurance Article.

(e)(1) In this subsection, "property insurance coverage" means property insurance against losses caused by perils that commonly are covered in insurance policies described

with terms similar to "standard fire" or "standard fire with extended coverage".

(2)(i) A credit grantor may not require a borrower, as a condition to receiving or maintaining a loan secured by a first lien, to provide or purchase property insurance coverage against risks to any improvements on any real property in an amount exceeding the replacement value of the improvements on the real property.

(ii) In determining the replacement value of the improvements on any real property, the lender may:

1. Accept the value placed on the improvements by the insurer; or

2. Use the value placed on the improvements that is determined by the lender's appraisal of the real property.

(3) A violation of this subsection shall entitle the borrower to:

(i) Seek an injunction to prohibit the credit grantor who has engaged or is engaging in the violation from continuing or engaging in the violation;

(ii) Reasonable attorney's fees; and

(iii) Damages directly resulting from the violation.

(4) A violation of this subsection does not affect the validity of the first lien securing the loan.

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§ 12-909.1. Binders

(a) In this section, "binder" means a binder or other temporary contract of insurance as provided under § 12-106 of the Insurance Article.

(b) A credit grantor shall comply with this section if the credit grantor:

(1) Makes any loan secured by a first lien on any interest in owner-occupied residential real property; and

(2) As a condition of making the loan, requires the consumer borrower to purchase property insurance or credit loss insurance.

(c) A credit grantor who makes a loan subject to this section shall accept as evidence of insurance a written binder issued by any authorized insurer or its insurance producer if the binder includes or is accompanied by:

(1) The name and address of the insured consumer borrower;

(2) The name and address of the credit grantor;

(3) A description of the insured residential real property;

(4) A provision that the binder may not be canceled within the term of the binder unless the credit grantor and the insured consumer borrower receive written notice of the cancellation at least 10 days prior to the cancellation;

(5) Except in the case of the renewal of a policy subsequent to the closing of the loan, a paid receipt for the full amount of the applicable premium; and

(6) The amount of coverage.

(d) This section does not prohibit a credit grantor from refusing to honor a binder in cases where:

(1) The credit grantor receives notice of the cancellation of the binder by the insurer; or

(2) At the expiration of 30 days of the date the binder was given, the insurer has failed to issue the policy of insurance.

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§ 12-910. Default or delinquency

(a) If the agreement governing a revolving credit plan permits, a credit grantor may:

(1) For a nonconsumer borrower, charge a higher periodic percentage rate of interest on outstanding unpaid payments or portions of payments under the plan which are in default; and

(2) For any borrower, impose:

(i) A late or delinquency charge on payments or portions of payments; and

(ii) If payment is made with a check that is dishonored on the second presentment, a charge not to exceed $15.

(b)(1) No more than one late or delinquency charge may be imposed for any single scheduled payment or portion regardless of the period during which it remains in default.

(2) For the purpose of this subsection, all payments by the borrower shall be applied to satisfaction of scheduled payments in the order in which they become due.

(3) Charges permitted by this section may not be considered interest or finance charges under the plan.

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§ 12-911. Attorney's fees and costs

(a) If a borrower defaults under the terms of a plan and the credit grantor refers the borrower's account to an attorney who is not a salaried employee of the credit grantor for collection, the credit grantor may, if the agreement governing the revolving credit plan permits, charge and collect from the borrower a reasonable attorney's fee.

(b) If the agreement governing the revolving credit plan permits, the credit grantor may recover from the borrower all court or other collection costs actually incurred by the credit grantor relating to the borrower's default.

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§ 12-912. Amending plan agreement

(a) A credit grantor may, if the agreement governing a revolving credit plan permits, at any time amend the terms of the agreement in accordance with the provisions of this section including:

(1) The terms governing the periodic percentage rate used to calculate interest or finance charges;

(2) The method of computing the outstanding unpaid indebtedness to which the rate is applied;

(3) The amounts of other charges; and

(4) The applicable repayment schedule.

(b)(1) The credit grantor shall notify each affected borrower of an amendment in the manner set forth in the

agreement governing the plan and in compliance with the requirements of the federal Truth in Lending Act,[1] and regulations promulgated thereunder. If the amendment has the effect of increasing the interest, finance charges, or other fees and charges to be paid by the borrower, including, but not limited to those enumerated in § 12-905 of this subtitle, the credit grantor shall mail or deliver to the borrower, at least 25 days before the effective date of the amendment, a clear and conspicuous written notice which shall describe the amendment, including:

(i) A clear statement comparing the original terms and the terms under the amended agreement; and

(ii) Any other pertinent information required by the provisions of this section.

(2) If the amendment has the effect of increasing the interest, finance charges, or other charges to be paid by the borrower, the amendment shall become effective as provided in subsections (c) and (d) of this section.

(c)(1) Subject to the provisions of this paragraph, an amendment made under this section shall become effective as to a particular borrower on:

(i) The first day of the billing cycle during which the effective date of the amendment occurs; or

(ii) Any later date specified in the notice of amendment.

(2) After receiving the notice of amendment under subsection (b) of this section, the borrower may send a

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[1] 15 U.S.C.A. § 1601 et seq.

signed, written notice of refusal to the creditor that the borrower refuses to accept the amendment.

(3) The notice of refusal sent by the borrower may be accompanied by a payment on the borrower's account and shall be mailed within 25 days of the mailing of the notice of amendment.

(4) Any borrower who gives timely notice of refusal may use the account pursuant to its original, unamended terms for:

(i)1. The duration of the time for which a fee was paid for use of the plan through the borrower's credit device; or

2. Any longer period of time as determined by the credit grantor; or

(ii) If no fee is paid for use of the plan or if the remaining time period for which a fee was paid for use of the plan through the borrower's credit device is less than 3 months, a period of time of not less than 3 months from the date of mailing of the notice of refusal.

(5) At the expiration of the periods provided under paragraph (4) of this subsection, the borrower who has given a timely notice of refusal may pay any outstanding unpaid indebtedness in the account under the terms of the unamended agreement governing the plan.

(6) A credit grantor amending the agreement governing a revolving credit plan under this subsection shall include in the notice of amendment under subsection (b) of this section a statement in at least 10 point type that:

(i) If a written notice of refusal from the borrower in which the borrower refuses to accept the

amendment is not received by the credit grantor within 25 days of the mailing of the notice of amendment, the amendment will become effective on the first day of the billing cycle during which the effective date of the amendment occurs or at any later date specified in the notice of amendment;

(ii) Enumerates the borrower's rights under paragraphs (4) and (5) of this subsection upon timely notice of refusal by the borrower; and

(iii) Includes the address to which the borrower may send notice of a refusal.

(7) The notice of amendment under subsection (b) of this section, shall be enclosed in an envelope that contains on its face a statement in 10 point type that an important notice of an increase in rates or fees of the revolving credit plan is enclosed.

(d)(1) Notwithstanding subsection (c) of this section, at the election of the credit grantor, an amendment made under this section may become effective as to a particular borrower on the first day of the billing cycle in which the borrower:

(i) Makes a purchase or obtains a loan under the plan, after the date specified in the notice of amendment which is not less than 25 days after the date the notice of amendment was mailed; or

(ii) Sends a notice of agreement to the credit grantor in which the borrower expressly agrees to the amendment.

(2) In addition to the requirements of subsection (b) of this section, a credit grantor electing to amend the agreement governing a revolving credit plan under this subsection shall include in the notice of amendment a statement that the amendment will become

effective on the first date of the billing cycle during which the borrower:

(i) Makes a purchase or obtains a loan under the plan, so long as the purchase is made or the loan is obtained after a specific date which is at least 25 days after the mailing of the notice of amendment; or

(ii) Sends a notice of agreement to the credit grantor in which the borrower expressly agrees to the amendment.

(3) A borrower who receives a notice of amendment under this subsection may pay any outstanding unpaid indebtedness in the account under the terms of the unamended agreement governing the plan if the borrower does not:

(i) Make any purchase or obtain any loan under the plan after the date specified in the notice of amendment; or

(ii) Send a notice of agreement to the credit grantor in which the borrower expressly agrees to the amendment.

(e) If the terms of the agreement governing the plan, as originally drawn or as amended provide, any amendment may, on and after the date on which it becomes effective as to a particular borrower, apply to all then outstanding unpaid indebtedness in the borrower's account under the plan, including any indebtedness which shall have arisen out of purchases made or loans obtained prior to the effective date of the amendment.

(f) For purposes of this section, a decrease in the required amount of scheduled payments shall not be deemed an

amendment which has the effect of increasing the interest or finance charges to be paid by the borrower.

(g) The procedures for amendment by a credit grantor of the terms of a plan to which a nonconsumer borrower is a party may, notwithstanding the provisions of this section, be as the agreement governing the plan may otherwise provide.

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§ 12-913. Construction with other laws

(a) Unless otherwise provided under the express terms of the agreement governing a revolving credit plan, the provisions of Subtitle 1, 3, 4, 5, 6, or 10 of this title do not apply to any extension of credit made pursuant to a revolving credit plan if:

(1) The plan is established before October 1, 1993; and

(2) The extension of credit is made under this subtitle before October 1, 1993.

(b) For the purposes of subsection (a) of this section, an extension of credit is made under this subtitle if:

(1) The credit grantor has made a written election to do so in the agreement governing the plan; or

(2) The agreement governing the plan is offered pursuant to the provisions of this subtitle.

(c) For the purposes of subsection (a) of this section, if there is no written election to extend credit under this subtitle in the agreement governing the plan, the burden of proof is on the credit grantor to show the agreement governing the plan was offered pursuant to this subtitle.

(d) Any plan established before October 1, 1993 is not subject to § 12-913.2 of this subtitle.

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§ 12-913.1. Election and applicable laws

(a)(1) On or after October 1, 1993, a credit grantor may at its option elect to offer a plan to any borrower either pursuant to this subtitle or as otherwise permitted by applicable law.

(2) In order for a plan to be established under and governed by this subtitle, a credit grantor shall make a written election to that effect in the agreement governing the plan.

(b)(1) If a credit grantor elects in accordance with this section to establish a plan under this subtitle, the provisions of Subtitle 1, 3, 4, 5, 6, or 10 of this title do not apply to the plan.

(2) If a person fails to elect in accordance with this section to establish a plan under this subtitle, the provisions of this subtitle do not apply.

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§ 12-913.2. Delivery of agreement

(a) The credit grantor shall deliver a copy of the agreement governing the plan to the borrower no later than 30 days after the credit grantor establishes the account governed by the agreement for the borrower's use.

(b) If there is more than one borrower, a copy of the agreement governing the plan may be delivered to any borrower who is primarily liable on the account.

(c) Written acknowledgment by a borrower of delivery in accordance with this section of a copy of the agreement governing the plan is conclusive proof of delivery as between the borrower and any assignee of the account established under the plan without actual knowledge to the contrary.

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§ 12-914. Severability; disclosure

(a) If any provision of this subtitle is held invalid, the invalidity shall not affect any other provision of this subtitle which can be given effect without the invalid provision.

(b) Notwithstanding any other provisions of this title, a plan under this subtitle is subject only to the disclosure requirements of this subtitle and, to the extent applicable, of the federal Truth in Lending Act[1] and regulations promulgated thereunder.

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§ 12-915. Financial institutions article; licensing

(a) A credit grantor making a loan or extension of credit under this subtitle is subject to the licensing, investigatory, enforcement and penalty provisions of Title 11, Subtitle 3 of the Financial Institutions Article unless the credit grantor or the loan or extension of credit is exempt under Title 11, Subtitle 3 of the Financial Institutions Article.

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[1]15 U.S.C.A. § 1601 et seq.

(b) In addition to any license which may be required by subsection (a) of this section, a credit grantor making a loan or extension of credit under this subtitle secured by any lien on residential real property is subject to the licensing, investigatory, enforcement and penalty provisions of Title 11, Subtitle 5 of the Financial Institutions Article unless the credit grantor or the loan or extension of credit is exempt under Title 11, Subtitle 5 of the Financial Institutions Article.

(c) If a license is required by this section, it shall be issued by the Commissioner of Financial Regulation.

(d)(1) An extension of credit made under this subtitle prior to October 1, 1994 by a home improvement contractor may not be deemed unenforceable or violative of this section because the contractor was not licensed under Title 11, Subtitle 3 of the Financial Institutions Article.

(2) Paragraph (1) of this subsection does not apply to any person engaged in the business of making loans at the time the credit was extended.

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§ 12-916. Complaints

(a) If a written complaint for violation of any provision of this subtitle, including the disclosure requirements of this subtitle and the federal Truth in Lending Act[1] and regulations promulgated thereunder, or any other law of this State that regulates loans or other extensions of credit is filed with the Commissioner of Financial Regulation,

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[1] 15 U.S.C.A. § 1601 et seq.

the Commissioner may investigate the complaint and hold a hearing on it in accordance with § 11-413 of the Financial Institutions Article.

(b)(1) The Commissioner shall give to the credit grantor against whom a complaint is filed at least 10 days' written notice of the complaint and the time and place of any hearing. The notice shall be in writing and sent by registered or certified mail to the credit grantor's principal place of business.

(2) Before a hearing under this section may be scheduled, the Commissioner shall:

(i) Send a written notice to the complaining party that describes the provisions in paragraph (3) of this subsection concerning preclusion; and

(ii) Obtain from the complaining party a written:

1. Election to proceed with a hearing in accordance with this section; and

2. Waiver of any right to pursue any cause of action or remedy as to the matters addressed in the complaint or the hearing.

(3)(i) If a complaining party provides a written election and waiver as described in paragraph (2)(ii) of this subsection, the complaining party shall be precluded from raising or asserting against the credit grantor in any subsequent forum any claim, defense, setoff, recoupment, penalty for violation, or right of any kind based on the matters addressed in the complaint or the hearing.

(ii) The preclusion in subparagraph (i) of this paragraph does not apply to an appeal from the order of the Commissioner resulting from the hearing.

(4) If a complaining party fails to provide a written election and waiver as described in paragraph (2)(ii) of this subsection, the Commissioner shall not schedule a hearing on the complaint.

(c)(1) If, after the hearing, the Commissioner finds that the credit grantor has engaged or is engaging in any act or practice prohibited by this subtitle, the Commissioner shall order the credit grantor to cease and desist from the act or practice.

(2)(i) If the Commissioner finds that the act or practice described in paragraph (1) of this subsection resulted in the credit grantor collecting an amount from the complaining party not permitted under this subtitle, the Commissioner may direct the credit grantor to make a refund to the complaining party.

(ii) The Commissioner may direct a refund only up to the amount collected by the credit grantor from the complaining party that:

1. Exceeds the amount expressly permitted under this subtitle; or

2. The credit grantor is expressly not permitted to collect.

(3)(i) If an order issued under this section directs the credit grantor to make a refund as authorized in paragraph (2) of this subsection, the credit grantor may make the refund before the order becomes final.

(ii) If a credit grantor makes the refund directed by the Commissioner's order, the order for the refund shall not become final and shall be withdrawn by the Commissioner.

(iii) Any order withdrawn by the Commissioner may not be considered evidence of the Commissioner's interpretation of this subtitle.

(4) The order of the Commissioner shall comply with the Administrative Procedure Act of the Code.

(d)(1) If no appeal is filed, the order becomes final after expiration of the time allowed by the Administrative Procedure Act for appeals from the Commissioner's orders.

(2) If an appeal is filed, the order becomes final after final decision of the court affirming the order or dismissing the appeal.

(e) For purposes of this section, "complaining party" means an individual who files a written complaint with the Commissioner of Financial Regulation pursuant to this section.

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§ 12-917. Willful violations

Any credit grantor or his officer or employee who willfully violates any provision of this subtitle is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $1,000 or imprisonment not exceeding 1 year, or both.

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§ 12-918. Civil remedies

(a)(1) In this subsection, "notice" means the first to occur of the following:

(i) When the credit grantor receives a written notice from the borrower notifying the credit grantor of an error or violation;

(ii) When the credit grantor receives a written notice from the Commissioner of Financial Regulation or the appropriate regulatory authority notifying the credit grantor of an error or violation; or

(iii) When the credit grantor receives service of process in a civil action for an error or violation instituted by the borrower in a court of competent jurisdiction.

(2) Except for a bona fide error of computation, if a credit grantor violates any provision of this subtitle the credit grantor may collect only the principal amount of credit extended and may not collect any interest, costs, fees, or other charges with respect to the credit extension.

(3) The penalty provided under paragraph (2) of this subsection does not apply where a credit grantor:

(i) Unintentionally and in good faith fails to comply with § 12-903, § 12-904, § 12-905, § 12-910, § 12-911, § 12-913.2, § 12-923(d), or § 12-924 of this subtitle; and

(ii) Corrects the error or violation and makes the borrower whole for all losses, including reasonable attorney's fees and interests, where appropriate, within 10 days after the credit grantor receives notice of the error or violation.

(4) The burden shall be on the credit grantor to show that the credit grantor's failure to comply with § 12-903, § 12-904, § 12-905, § 12-910, § 12-911, § 12-913.2, § 12-923(d), or § 12-924 of this subtitle was unintentional and in good faith.

(b) A credit grantor who knowingly violates any provision of this subtitle shall forfeit to the borrower 3 times the amount of interest, fees, and charges collected in excess of that authorized by this subtitle.

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§ 12-919. Statute of limitations

An action for violation of this subtitle may not be brought more than 6 months after the credit extension is repaid in full.

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§ 12-920. Limitation of liability

A credit grantor is not liable for any failure to comply with a provision of this subtitle if, within 60 days after discovering an error and prior to institution of an action under this subtitle or the receipt of written notice from the borrower, the credit grantor notifies the borrower of the error and makes whatever adjustments are necessary to correct the error.

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§ 12-921. Repossession

(a)(1) A credit grantor may repossess tangible personal property securing a plan under an agreement if the consumer borrower is in default.

(2) The credit grantor may repossess tangible personal property from a consumer borrower only by:

(i) Legal process; or

(ii) Self-help, without use of force.

(b) Nothing in this section authorizes a violation of criminal law.

(c)(1) At least 10 days before a credit grantor repossesses any tangible personal property, the credit grantor may serve a written notice on the consumer borrower of the intention to repossess the tangible personal property.

(2) The notice shall:

(i) State the default and any period at the end of which the tangible personal property will be repossessed; and

(ii) Briefly state the rights of the consumer borrower in case the tangible personal property is repossessed.

(d) The notice may be delivered to the consumer borrower personally or sent to him at his last known address by registered or certified mail.

(e) Within 5 days after the credit grantor repossesses the tangible personal property the credit grantor shall deliver to the consumer borrower personally or send to him at his last known address by registered or certified mail, a written notice which briefly states:

(1) The right of the consumer borrower to redeem the tangible personal property, and the amount payable for it;

(2) The rights of the consumer borrower as to a resale, and his liability for a deficiency; and

(3) The exact location where the tangible personal property is stored and the address where any payment is to be made.

(f) For 15 days after the credit grantor gives the notice required by subsection (e) of this section, the credit grantor shall retain any repossessed property.

(g) During the period provided for in subsection (f) of this section, the consumer borrower may:

(1) Redeem and take possession of the property; and

(2) Resume the performance of the agreement.

(h) To redeem the property, the consumer borrower shall:

(1) Tender the amount due under the agreement at the time of redemption, without giving effect to any provision which allows acceleration of any installment otherwise payable after that time;

(2) Tender performance of any other promise for the breach of which the property was repossessed; and

(3) If the discretionary notice provided for in subsection (c) of this section was given, pay the actual and reasonable expenses of retaking and storing the property.

(i) This section does not apply if the consumer borrower was guilty of fraudulent conduct, intentionally and wrongfully concealed, removed, damaged, or destroyed the property, or attempted to do so, and the property was repossessed because of that conduct, or if the property has been previously repossessed from the consumer borrower and redeemed by the consumer borrower.

(j)(1)(i) Subject to subsection (l) of this section, the credit grantor shall sell the property that was repossessed at:

1. Subject to paragraph (2) of this subsection, a private sale; or

2. A public auction.

(ii) At least 10 days before the sale, the credit grantor shall notify the consumer borrower in writing of the time and place of the sale, by certified mail, return receipt requested, sent to the consumer borrower's last known address.

(iii) Any sale of repossessed property must be accomplished in a commercially reasonable manner.

(2) In all cases of a private sale of repossessed goods under this section, a full accounting shall be made to the borrower in writing and the seller shall retain a copy of this accounting for at least 24 months. This accounting shall contain the following information:

(i) The unpaid balance at the time the goods were repossessed;

(ii) The refund credit of unearned finance charges and insurance premiums, if any;

(iii) The remaining net balance;

(iv) The proceeds of the sale of the goods;

(v) The remaining deficiency balance, if any, or the amount due the buyer;

(vi) All expenses incurred as a result of the sale;

(vii) The purchaser's name, address, and business;

(viii) The number of bids sought and received; and

(ix) Any statement as to the condition of the goods at the time of repossession which would cause their value to be increased or decreased above or below the market value for goods of like kind and quality.

(3) The Commissioner of Financial Regulation may make a determination concerning any private sale that the sale was not accomplished in a commercially reasonable manner. Upon that determination, the Commissioner may enter an order disallowing any claim for a deficiency balance.

(k)(1) The provisions of this subsection apply to a public sale of property which secured a plan in excess of $2,000 at the time the plan was made.

(2) The proceeds of a sale to which this subsection applies shall be applied, in the following order, to:

(i) The actual and reasonable cost of the sale;

(ii) The actual and reasonable cost of retaking and storing the property; and

(iii) The unpaid balance owing under the agreement at the time the property was repossessed.

(3) The credit grantor shall furnish to the consumer borrower a written statement which shows the distribution of the proceeds.

(4) If the provisions of this section, including the requirement of furnishing a notice following repossession, are not followed, the credit grantor shall not be entitled to any deficiency judgment to which he would be entitled under the plan.

(l)(1)(i) In this subsection, "consumer goods" means tangible personal property used or bought for use primarily for personal, family, or household purposes that is:

1. Movable at the time a security interest attaches; or

2. A fixture.

(ii) "Consumer goods" does not include money, documents, instruments, accounts, chattel paper, or general intangibles.

(2) This subsection applies to tangible personal property securing a plan that:

(i) Has been repossessed by the credit grantor; or

(ii) Is in actual or constructive possession of the credit grantor where the perfection of the security interest in the property depends on the possession of the property.

(3) In the case of a purchase money security interest in consumer goods, if a consumer borrower has paid 60 percent of the cash price and, after default, has not signed a statement renouncing or modifying the consumer borrower's rights under this subsection, a credit grantor who has repossessed the consumer goods must take reasonable action within 90 days after the repossession to commence disposal of them in the manner provided under subsection (j) of this section.

(4)(i) In any other case involving tangible personal property securing a plan, a credit grantor may, after default, propose to retain the property in full satisfaction of the obligations of the borrower under the plan.

(ii) If, as authorized by subparagraph (i) of this paragraph, a credit grantor proposes to retain property in full satisfaction of the obligations of the borrower under the plan, the credit grantor shall send written notice of the proposal to:

1. The consumer borrower; and

2. Except in the case of consumer goods, any other person who has a security interest in the property and who:

A. Has duly filed a financing statement indexed in the name of the consumer borrower in this State; or

B. Is known by the credit grantor to have a security interest in the property.

(iii) 1. If the consumer borrower or other person entitled to receive notification objects in writing within 30 days from the sending of the notification, the credit grantor must take reasonable action to dispose of the property in the manner provided under subsection (j) of this section.

2. In the absence of written objection, the credit grantor may retain the property in full satisfaction of the outstanding unpaid indebtedness under the plan.

(5) If despite complying with the requirements of this section there is no sale of tangible personal property securing a plan under subsection (j) of this section:

(i) The credit grantor may retain the property without obligation to account to the borrower; and

(ii) If the property is retained, all obligations of the borrower under the plan shall be discharged.

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§ 12-922. Definitions; financing agreements; damages

(a)(1) In this section the following words have the meanings indicated.

(2) "Borrower" means a consumer borrower who makes an application for a loan secured by a first mortgage or first deed of trust on residential real property to be occupied by the borrower as the borrower's primary residence.

(3) "Commitment" means a written, specific, binding agreement between a borrower and a lender which sets forth the terms of a loan being extended to the borrower.

(4) "Financing agreement" means a written agreement between a borrower and a lender which sets forth the terms of a purchase money loan or a refinancing of an existing loan that:

(i) Results in or is secured by a first mortgage or a first deed of trust on residential real property to be occupied by the borrower; and

(ii) Is offered or extended to the borrower.

(5)(i) "Lender" means a credit grantor subject to the licensing requirements of Title 11, Subtitle 5 of the Financial Institutions Article.

(ii) "Lender" does not include a credit grantor exempt from licensing under § 11-502 of the Financial Institutions Article.

(6)(i) "Loan application" means any oral or written request for an extension of credit that is made in accordance with procedures established by a lender for the purpose of inducing the lender to seek to procure or make a mortgage loan.

(ii) "Loan application" does not include the use of an account or line of credit to obtain a loan within a previously established credit limit.

(b)(1) A lender who offers to make or procure a loan secured by a first mortgage or first deed of trust on residential real property to be occupied by the borrower shall provide the borrower with a financing agreement executed by the lender within 10 business days after the date the loan application is completed.

(2) The financing agreement shall provide:

(i) The term and principal amount of the loan;

(ii) An explanation of the type of mortgage loan being offered;

(iii) The rate of interest that will apply to the loan and, if the rate is subject to change or is a variable rate or is subject to final determination at a future date based on some objective standard, a specific statement of those facts;

(iv) The points, if any, to be paid by the borrower or the seller, or both; and

(v) The term during which the financing agreement remains in effect.

(3) If all the provisions of the financing agreement are not subject to future determination, change, or alteration during its term, the financing agreement shall constitute the final binding agreement between the parties as to the items covered by the financing agreement.

(c)(1) If any of the provisions of the financing agreement are subject to change or determination after its execution, the lender shall provide the borrower with a commitment, executed by the lender, at least 72 hours before the time of settlement agreed to by the parties, providing:

(i) The effective fixed interest rate or initial interest rate that will be applied to the loan; and

(ii) A restatement of all the remaining unchanged provisions of the financing agreement.

(2) Subsequent to execution of the financing agreement, the borrower may waive in writing the 72-hour advance presentation requirement and accept the

commitment at settlement only if compliance with the 72-hour requirement is shown by the lender to be infeasible.

(d)(1) A borrower aggrieved by any violation of this section shall be entitled to bring a civil suit for damages, including reasonable attorney's fees, against the lender.

(2) The penalties set out under § 12-918 of this subtitle do not apply to any violation of this section.

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§ 12-923. Revolving credit plans

(a) This section applies only to a plan established by a credit grantor under this subtitle for a consumer borrower.

(b)(1) Paragraph (2) of this subsection applies only to a loan or an extension of credit primarily for personal, household, or family purposes.

(2) An agreement governing a revolving credit plan or any instrument which evidences or secures an extension of credit under the plan may not contain:

(i) An assignment or order for the payment of wages, whether earned or to be earned, or of any chose in action covering lost wages;

(ii) An acceleration clause under which any part or all of the unpaid balance of any extension of credit not yet matured may be declared due and payable because the credit grantor deems itself insecure;

(iii) A confession of judgment or any power of attorney authorizing the credit grantor to appear in court to confess judgment against the borrower or a surety or guarantor of the borrower, or

any other waiver of the right to notice and an opportunity to be heard in the event of suit or process thereon; or

(iv) A provision by which a person acting on behalf of a holder of the agreement is treated as an agent of the borrower in connection with its formation or execution.

(3) Except as expressly allowed by law, an agreement governing a revolving credit plan or any instrument which evidences or secures an extension of credit under the plan may not contain a provision by which the borrower waives any right accruing to the borrower under this subtitle.

(4)(i) Any clause or provision in an agreement governing the plan or in any instrument which evidences or secures an extension of credit under a plan that is in violation of this subsection shall be unenforceable.

(ii) Subject to subparagraph (iii) of this paragraph, the penalties set out under §§ 12-917 and 12-918 of this subtitle do not apply unless the credit grantor attempts to enforce a provision prohibited under this subsection.

(iii) The penalties set out under §§ 12-917 and 12-918 of this subtitle do not apply to the enforcement by a credit grantor of a provision otherwise prohibited under this subsection where the enforcement was initiated by the credit grantor prior to October 1, 1993.

(c) Unless a borrower has notice of an assignment of the account established under the plan, any payments made by the borrower to the last known holder of the account shall discharge the borrower's obligation to the extent of the payments.

(d) Upon receipt of a cash payment from a borrower, a credit grantor shall give the borrower a written receipt for the payment.

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§ 12-923.1. Statements of borrower

(a) Any statement or characterization that indicates the borrower intends to use a plan to obtain loans or other extensions of credit solely to acquire an interest in or to carry on a business or commercial enterprise may be relied upon by a credit grantor in establishing a plan, unless the credit grantor knows or should know that the statement or characterization is false or misleading.

(b) As a condition to the establishment of a plan, a credit grantor may not require a borrower to make any false or misleading statement or characterization that loans or other extensions of credit to be obtained under a plan are commercial loans or for a commercial purpose if the credit grantor knows or should know they are not commercial loans or for a commercial purpose.

(c) The borrower has the burden of proving that a credit grantor knew or should have known that a statement or characterization described in subsection (a) or (b) of this section was false or misleading when made and that loans or other extensions of credit obtained under a plan were not commercial loans or extensions of credit for a commercial purpose.

(d) Unless a credit grantor knew or should have known that a statement or characterization described in subsection (a) or (b) of this section was false or misleading when made, a credit grantor shall have no liability under this subtitle if loans or other extensions of credit under a plan

are actually used by the borrower other than as commercial loans or other extensions of credit for a commercial purpose.

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§ 12-924. Releases

(a)(1) Except as provided in paragraph (2) of this subsection, this section applies only to a plan between a credit grantor and a consumer borrower under which a credit grantor has taken any property as security for credit extended under the plan.

(2) This section does not apply to a loan to which § 3-105.1 of the Real Property Article applies.

(b) A credit grantor shall release any recorded mortgage, deed of trust, security agreement, or other lien securing the extension of credit within a reasonable time after:

(1) The outstanding unpaid indebtedness under a plan has been paid in full;

(2) There are no further obligations of the credit grantor or the consumer borrower under the plan; and

(3) The account under the plan is closed.

(c) The release shall be:

(1) In writing; and

(2) Prepared at the expense of the credit grantor.

(d)(1) If the credit grantor does not record the release, the credit grantor shall furnish the consumer borrower with the release in a recordable form.

(2) If the credit grantor records the release, the credit grantor shall furnish the consumer borrower with a copy of the release.

(e)(1) If a fee is collected by a credit grantor for the recording of a release:

(i) The release shall be recorded by the credit grantor; and

(ii) Any portion of the fee not paid to a governmental entity for recording the release shall be refunded to the borrower.

(2) If a fee is not collected by a credit grantor for the recording of a release, the credit grantor is not obligated to record the release.

APPENDIX D

[LOGO] **Office of Thrift Supervision**
Department of the Treasury *Chief Counsel*
1700 G Street, N.W., Washington, DC 20552 •
(202) 906-6251

October 6, 2003

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Re: Preemption of New York Laws Purporting to Regulate Escrow Accounts

Dear [ ]:

You have asked whether federal law preempts, for a federal savings association, New York state requirements to pay interest on escrow accounts established pursuant to mortgage loan agreements. You also ask whether a mortgage document containing a choice of law provision that references both federal law and New York law establishes a contractual provision to pay escrow interest.

We conclude that the New York requirements about which you inquire are preempted by federal law from applying to federal savings associations. We also conclude that the reference to federal law and state law in a choice of law provision includes the preemptive effect of federal law and does not establish an obligation to pay escrow interest that would not otherwise exist.

Background

Your client, [ ] (Bank), is a state-chartered commercial bank supervised by the FDIC. The Bank is the successor by merger in [ ], to the former [ ] (Association), a federal savings association. You have provided us with the following information in support of your inquiry.

Before Association was merged into Bank, Association made residential mortgage loans. Association sold certain loans, but retained the servicing on such loans. With respect to a particular mortgage loan that Association made and sold, but for which the Association retained the servicing, the borrowers have alleged in a lawsuit that Association failed, in violation of New York law, to pay interest on escrow funds Association held for the borrowers.[1] One section of the mortgage document[2] signed by the borrowers provides that the lender is not required to pay any interest or earnings on escrow funds unless the parties agree in writing that the lender will pay such interest or the law requires the payment of interest on escrow funds.[3] Another section of the mortgage document provides that it is governed by "federal law and the law that applies in the place where the Property is located."

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[1] [ ]

[2] The mortgage document at issue is titled "Mortgage" and is denominated "New York – Single Family – FNMA/FHLMC Uniform Instrument."

[3] There was no written agreement by Association to pay interest on the funds it held in escrow for the borrowers and Association did not pay such interest.

The property securing the mortgage is located in the State of New York.

You indicate that several provisions of New York law are at issue. One provision requires every "mortgage investing institution," including federal savings associations, that maintains an escrow account pursuant to a mortgage agreement to pay interest on the funds on deposit in that account.[4] The same provision also authorizes the New York banking board to prescribe by regulation the method of computing interest. A second provision of New York law authorizes the state banking board to prescribe by regulation a minimum rate of interest that a mortgage investing institution is required to pay on escrow accounts maintained with respect to mortgage loans.[5] Another section of the same law provides that the payment of interest shall not be required on escrow accounts where "the payment of such interest would violate any federal law or regulation."[6] Two other provisions of New York law require mortgage investing institutions to pay interest on escrow accounts established for payment of real property taxes and hazard insurance

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[4] N. Y. Gen. Oblig. L. § 5-601 (McKinney, WESTLAW through L.2003). The term "mortgage investing institution" is defined to include any "federal savings and loan association." N.Y. Banking L. § 14-b(5) (McKinney 2001).

[5] N.Y. Banking L. § 14-b(1) (McKinney, WESTLAW through L.2003).

[6] N.Y. Banking L. § 14-b(4)(ii) (McKinney, WESTLAW through L.2003).

premiums.[7] Finally, New York State Banking Department regulations prescribe the method of computing interest that should be paid on escrow accounts.[8]

Discussion

Federal law preempts for federal savings associations the provisions of New York law discussed above, which purport to require the payment of interest on mortgage related escrow accounts. We have addressed this issue on several previous occasions in several different formats.

First, OTS regulations promulgated pursuant [to] section 5 of the federal Home Owners' Loan Act,[9] provide that OTS occupies the fields of lending regulation and deposit-related regulated regulation for federal savings associations.[10] OTS regulations provide illustrative examples of the types of state laws that are preempted, as well as the types of state laws that generally are not preempted.[11] Section 560.2(b)(6) of OTS's lending regulations specifically preempts state laws that purport to impose requirements regarding escrow accounts.[12]

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[7] N.Y. Real Property Tax L. § 953(2) (McKinney, WESTLAW through L.2003); N.Y. Banking L. § 6-k(2)(b) (McKinney, WESTLAW through L.2003).

[8] N.Y. Comp. Codes R. & Regs. tit. 3, § 10.1 (WESTLAW through March 15, 2003).

[9] 12 U.S.C.A. § 1464 (West 2001).

[10] 12 C.F.R. § 560.2(a) (Lending and Investment) and 12 C.F.R. § 557.11(b) (Deposits) (2003).

[11] See 12 C.F.R. § 560.2(b) and (c) (2003).

[12] 12 C.F.R. § 560.2(b)(6) (2003).

Second, in a 1991 opinion involving a provision of New York law, OTS concluded that federal law preempts a state law requiring the payment of interest on escrow accounts and, therefore, such a law is not applicable to federal savings associations.[13] Third, OTS's predecessor agency, the Federal Home Loan Bank Board (FHLBB), had concluded that federal savings associations are not obligated to pay interest on escrow accounts absent an express contractual provision to the contrary, and that state laws purporting to require associations to pay interest on escrow accounts are preempted.[14] We direct you to the reasoning and analyses set forth in the OTS and FHLBB opinions. In 1998, OTS noted the continued validity of the conclusions in these OTS and FHLBB opinions regarding federal preemption of state laws purporting to regulate escrow accounts.[15]

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[13] Op. OTS Chief Counsel (January 3, 1991). The opinion concluded that § 953 of the New York Real Property Tax Law is preempted "to the extent it purports to regulate interest payments, service charges, and the disclosure of information on escrow accounts for mortgages between Federal savings associations and their borrowers."

[14] Op. FHLBB General Counsel (August 13, 1985) and Op. FHLBB General Counsel (September 24, 1984). *See also, Wisconsin League of Financial Institutions v. Galecki*, 707 F.Supp. 401 (W.D. Wisc. 1989), which found a Wisconsin law regulating tax escrow accounts maintained in connection with mortgage loans preempted. The law required lenders to provide certain disclosures and notices to borrowers, and to pay interest on escrow accounts under certain conditions. Although the court's decision focused on the state disclosure requirements, the court stated, "federal regulation in this area preempts state regulation of mortgage loan escrow accounts and disclosures, ..." 707 F.Supp. at 406.

[15] *See* Letter dated November 17, 1998 by OTS Assistant Chief Counsel.

You also ask us to confirm that a choice of law provision in the mortgage document that invokes federal law and the law of the state where the real property is located, in this case New York, does not establish a contractual agreement to pay interest on escrow accounts "as if the preempted provisions of New York State law were not preempted." The reference in the mortgage loan document to the law of the place the property is located (New York), together with a reference to federal law, is insufficient to establish a contractual agreement to pay interest on escrow funds. The reference to federal law and state law in the same provision of the mortgage document includes the preemptive effect of federal law. In other words, Federal law continues to operate so as to preempt an impermissible state requirement. The reference to state law does not nullify or negate the preemptive effect of federal law. The Supreme Court has recognized that even where a federal regulation arguably incorporates state law, "the incorporation of state law does not signify the inapplicability of federal law."[16] New York law also appears to recognize the applicability of federal law because New York law specifically provides that the payment of interest on escrow accounts is not required where such payment would violate any federal law or regulation.

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[16] *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 157 (1982) (*de la Cuesta*). The Court explained that a "fundamental principle in our system of complex national polity" mandates that "the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution." *Id.* The provision at issue in *de la Cuesta* was a due on sale provision; federal regulations permitted federal savings association to use such clauses, but state law limited the use of such clauses.

In *de la Cuesta* the Supreme Court also rejected a contention that deeds of trust stating that they were to be governed by the law of the jurisdiction in which the property is located constituted an agreement to be bound by local law. Thus, even in the absence of a specific reference in the deeds to federal law, the Court observed that the "'law of the jurisdiction' includes federal as well as state law."[17] The Court also noted that the purpose of the language was "not to elevate state law over federal law, but to provide a uniform choice-of-law provision to be used when interstate disputes arose regarding the interpretation of a mortgage."[18]

Accordingly, we conclude that the Association was not required to pay interest on the escrow accounts Association held for borrowers. Federal law preempted the New York requirements to pay escrow interest, and the reference in the mortgage document to the law of the place where the property is located does not change this result.

In reaching the foregoing conclusions, we have relied on the factual representations made in the material you submitted to us as summarized herein, Our conclusions necessarily depend upon the accuracy and completeness of

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[17] 458 U.S. 157, n.12. The "law of the jurisdiction" language at issue in *de la Cuesta* was contained in paragraph 15 of a "uniform mortgage instrument developed by the Federal Home Loan Mortgage Corporation [FHLMC] and the Federal National Mortgage Association [FNMA]" and did not also include a reference to federal law. 458 U.S. 148, n.5. The language that is the subject of your inquiry also appears in paragraph 15 of a FNMA/FHLMC uniform mortgage document and includes a specific reference to federal law.

[18] 458 U.S. 157, n.12, citing the amicus brief filed by the FHLMC and the FHLBB in the *de la Cuesta* case.

those facts. Any material difference in facts or circumstances from those described herein could result in different conclusions.

We trust that this is responsive to your inquiry. If you have further questions, please contact Vicki Hawkins-Jones, Special Counsel, at (202) 906-7034.

Sincerely,

/s/ Carolyn J. Buck
Carolyn J. Buck
Chief Counsel

cc: Regional Directors
Regional Counsel

APPENDIX E

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October 6, 2003

Via Facsimile: (202) 874-4448

Office of the Comptroller of the Currency
250 E Street, S.W., Public Information Room,
Mailstop 1-5
Washington, DC 20219

Re: Docket No. 03-16, 12 CFR Parts 7 and 34.

Dear Sir or Madam:

We, the undersigned Attorneys General of 50 States and the Virgin Islands and the District of Columbia Office of Corporation Counsel, submit the following Comments on the rules proposed by the Office of the Comptroller of

the Currency in Docket No. 03-16. As the chief law enforcement officials of our respective jurisdictions, we strongly oppose these preemption rules and urge the OCC to defer further action on them.

The OCC's current proposal, coupled with other recent OCC pronouncements on preemption, represents a radical restructuring of federal-state relationships in the area of banking. In recent years, the OCC has embarked on an aggressive campaign to declare that state laws and enforcement efforts are preempted if they have any impact on a national bank's activities. The OCC has zealously pushed its preemption agenda into areas where the States have exercised enforcement and regulatory authority without controversy for years.

The OCC's preemption analysis is one-sided and self-serving. The OCC has paid little deference to well-established history and precedent that has allowed the States and the OCC to coexist in a dual regulatory role for over 130 years. That precedent has upheld this nation's policy that national banks are subject to state laws unless the state laws significantly impair the national bank's powers created under federal law. The OCC is destroying that careful balance by finding "significant interference" or "undue burden" whenever state law has *any* effect on a national bank.

The States acknowledge that the National Bank Act preempts some state laws, such as regulation of credit card interest rates charged by out-of-state national banks.[1]

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[1] *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978).

Particularly in the area of consumer protection, however, there are state laws that affect virtually all commercial entities doing business with the public, including banking institutions. These laws do not impose significant burdens on national bank activities and are applied evenhandedly throughout the marketplace. As a general rule, state consumer protection laws prohibit businesses from engaging in unfair or deceptive practices. These laws are consistent with Section 5 of the Federal Trade Commission Act, and the States traditionally have enforced them in a wide range of financial activities involving consumers. A national bank's compliance with these laws should be expected and welcomed by the OCC, not regarded as a "significant impairment" of the bank's federal rights. It would be unprecedented and unfair to grant national banks (including, in the OCC's view, affiliated *nonbank* institutions) total immunity from all state consumer protection regulation and enforcement.

In the area of predatory mortgage lending, the OCC's actions are particularly disappointing. The States have taken a leadership role in devising legislation to restrict abusive practices in home equity lending. These state laws were carefully crafted to avoid preemption issues, to create safe harbors for mortgage lenders, and to add consumer protections to high cost subprime loans. In the States' experience, these laws have worked. Instead of commending the States' efforts, the OCC has gone to great lengths to attack them and to declare that they are inapplicable to national banks and their operating subsidiaries. In their place, the OCC has recommended minimal protections that fail to address many of the worst predatory lending abuses.

The States would prefer to cooperate and partner with the OCC, especially when enforcement resources are limited. The States and the OCC share similar goals of

protecting the public and providing for a fair credit marketplace. But instead of seeking cooperation and joint enforcement, the OCC is insisting on an exclusive regulatory regime that would eliminate the role of the States, particularly with respect to such important consumer protection issues as predatory mortgage lending and telemarketing abuses. There is much work to be done by all regulatory and enforcement agencies on real and pressing problems. The States submit that this is not the time to devote energies to turf battles and empire building.

A. National Banks Historically Have Been Subject to State Laws and a Dual System of Enforcement.

The OCC's recent campaign to obtain exclusive enforcement authority over its constituent national banks, and to shield the banks from virtually all state laws, ignores a longstanding tradition of federal and state enforcement. Under this dual system, federal authorities have overseen, the business activities of national banks to ensure the "safety and soundness" of banking institutions. The States, for their part, have enforced state laws of general application against all persons and businesses within their borders, including national banks. This complementary system of state and federal enforcement has worked well, both to maintain safe and sound banking practices, and to protect the consuming public from deleterious business practices. The dual system has roots not only in actual enforcement experience, but also in U.S. Supreme Court and other judicial precedents as well as Congressional pronouncements recognizing the vital role of the States in monitoring business activities within their borders.

1. Under Supreme Court Precedent, National Banks Are Subject to State Laws that Do Not Conflict With, or Substantially Impair, Bank Rights under Federal Law.

The National Bank Act ("NBA"), on which the OCC heavily relies to augment its powers, is a Civil war-era statute that was intended to finance the war and restore control of the monetary system to the federal government.[2] Contrary to the OCC's current assertions, the NBA was *not* intended to divest all state authority over national banks. Indeed, from its earliest decisions involving the NBA, the U.S. Supreme Court has recognized and upheld the applicability of state laws to national banks. In 1870, the Supreme Court rejected a preemption challenge to a state's collection of a bank shares tax, declaring that national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."[3] In *McClellan v. Chipman,*[4] the Court rejected a bank's "assertion that national banks in virtue of the [NBA] are entirely removed, as to all their contracts, from any and every control by the state law," holding instead that state laws govern the business transactions of national banks except in areas where Congress expressly preempts state law or state law would impair the banks'

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[2] Act June 3, 1864, ch. 106, 13 Stat. 99.

[3] *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 361-62 (1870).

[4] 164 U.S. 347, 359 (1896).

efficiency in carrying out their duties imposed by federal law. Other Supreme Court decisions affirm the principle that national banks remain subject to many state laws.[5]

In general, the Supreme Court has upheld state laws that 1) did not expressly conflict with the statutory powers of national banks; 2) did not discriminate against national banks; or 3) did not impose undue burdens on the performance of bank functions mandated or permitted under national banking laws. Where the Court has found preemption, it usually has been in instances where the state law either prohibited or significantly impaired an express statutory power of a national bank.

The Supreme Court's 1996 decision in *Barnett Bank of Marion County, N.A. v. Nelson*[6] is consistent with these

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[5] *See, e.g., Davis v. Elmira Savings Bank*, 161 U.S. 245, 290 (1896) ("Nothing, of course, in this opinion is intended to deny the operation of general and undiscriminating state laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purpose of Congressional legislation."); *First National Bank in St. Louis v. Missouri*, 263 U.S. 640, 656 (1924) (National banks "are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States."); *Anderson National Bank v. Luckett*, 321 U.S. 233, 244-52 (1944) ("National banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions," holding that a state statute administering abandoned deposit accounts did not "unlawful[ly] encroac[h] on the rights and privileges of national banks."); *Franklin National Bank v. New York*, 347 U.S. 373, 378 n.7 (1954) ("National banks may be subject to some state laws in the normal course of business if there is no conflict with federal law."). More recently, in the 1997 case, *Atherton v. FDIC*, 519 U.S. 213, 222-23, the Supreme Court reaffirmed the principle that "federally chartered banks are subject to state law," based on its earlier decisions.

principles. In *Barnett* the Court struck down a Florida law restricting the sale of insurance by national banks because a federal statute granted national banks the right to sell insurance in towns of 5,000 or fewer. The Court stated that preemption would be found if there was a direct conflict with express federal statutory authority because "normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted."[7] However, the Court went on to stress that the preemption test was *not* intended "to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers."[8]

Therefore, the test to determine whether a state law is preempted when applied to a national bank focuses on whether there is a "significant impairment" of a bank's express rights under federal law or a "significant interference" with the legitimate functions of a bank. This test reflects the traditional standard for conflict preemption in that only those state laws significantly interfering with a bank's exercise of its powers are preempted.

Lower court decisions also have recognized and affirmed the general applicability of state laws to national banks. For example, in *Video Trax, Inc. v. NationsBank, N.A.*,[9] the U.S. District Court for the Southern District

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[6] 517 U.S. 25 (1996).

[7] *Id.* at 33.

[8] *Id.*

[9] 33 F. Supp. 2d 1041, 1048 (S.D. Fla. 1998), *aff'd per curiam*, 205 F.3d 1358 (11th Cir.), *cert. denied*, 531 U.S. 822 (2000).

Court of Florida observed: "Banking is not an area in which Congress has evidenced an intent to occupy the entire field to the exclusion of the states, and thus, state legislatures may legislate in all areas not expressly or impliedly preempted by federal legislation."

The OCC's current approach to conflict preemption flies in the face of these judicial precedents; it is so sweeping that, in reality, the OCC is establishing a regime of field preemption. The OCC presupposes that any state law that can arguably "impair the efficiency" of national bank lending operations compels a finding of preemption. Under this theory, most state consumer protection laws would be preempted, since such laws are unlikely to provide any protection without having some incidental impact on a bank's "efficiency." The OCC should not, by expansively interpreting the terms "impair significantly" and "significant interference," undertake to overturn over 130 years of precedent establishing that national banks are not entitled to immunity from all state laws and regulation.

2. Congressional Intent Supports the Applicability of State Law to National banks and the Presumption against Preemption.

In 1994, Congress enacted the Riegle-Neal Interstate Banking and Branching Efficiency Act to permit national banks to operate interstate branches to better serve consumers. In enacting the legislation, Congress made a clear pronouncement of its intent that state law would continue to apply to the interstate operations of national banks, particularly in the area of consumer protection. The report of the House-Senate conference committee on the Riegle-Neal Act noted that *"[u]nder well established*

judicial principles, national banks are subject to state law in many significant respects."[10] The report emphasized:

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses and communities. Congress does not intend that the Interstate Banking and Branching Efficiency Act of 1994 alter this balance and thereby weaken States' authority to protect the interests of their consumers, businesses, or communities.[11]

On the question of whether state laws may be preempted by federal banking law, the Conference Report noted that courts generally have applied "a rule of construction that avoids finding a conflict between Federal and State law where possible."

The OCC appears tone deaf to the Congressional message sent by Riegle-Neal. The OCC discounts Riegle-Neal's legislative history by noting that the Act excluded from its coverage those state laws that were preempted by federal law. While this statement is correct, the OCC ignores the fact that in 1994, when Riegle-Neal was enacted, it was generally accepted that most state consumer protection laws (outside of usury regulation) were not subject to preemption. Now that the OCC is taking the position that essentially all state consumer protection laws

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[10] H.R. Rep. No. 103-651, reprinted in 1994 U.S. Code Cong. & Ad. News 2068, 2074 (emphasis added).

[11] *Id.*

are preempted as to national banks, it contends that the Riegle-Neal mandate on the continued applicability of such state laws has no import. Surely, Congress did not anticipate that its stated intent could be displaced by the OCC pushing the boundaries of preemption off the map.

B. The OCC Has Established an Aggressive Pattern of Advocating Preemption of State Laws.

The OCC has, of late, undermined Congressional intent and the historic federal-state balance by promoting preemption and exclusive OCC control at every opportunity. In recent court appearances, policy statements, opinion letters and proposed rules, the OCC has articulated an intent to exempt its bank clientele from any duty to comply with state law or state consumer protection enforcement. The OCC's efforts have included reducing the traditional "significant interference" test to one of "impairing the efficiency" of a national bank; construing the "visitorial powers" of the OCC[12] to exclude any state enforcement of state laws; and using the "incidental powers" granted national banks under the NBA[13] as a catch-all preemption provision.

The OCC has been candid about its desire, for the benefit of its constituent national banks, to sweep aside the nuisance of state laws; "The ability of a national bank to conduct a multistate business subject to a single uniform set of federal laws, under the supervision of a single regulator, free from the visitorial powers of various state authorities, is

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[12] 12 U.S.C. § 484.

[13] 12 U.S.C. § 24 (Seventh)

a major advantage of the national charter. . . .,"[14] The Comptroller has stated that the power to override state law "is one of the advantages of a national charter and I'm not the least bit ashamed to promote it."[15]

The OCC has been an assertive advocate in persuading most federal courts to ratify its aggressively expansive preemption policy.[16] In all of the recent decisions cited by the OCC as background for the proposed rule, federal courts found in favor of the OCC's position on preemption. This is hardly surprising, given the OCC's aggressive advocacy role in the federal courts.

Under the *Chevron* doctrine,[17] federal courts give substantial deference to federal regulatory agencies when interpreting laws enforced by those agencies. Pursuant to the Supreme Court's directive in *Chevron*, federal courts must exercise restraint in substituting their own construction of a statute for a "reasonable" interpretation by the appropriate agency administrator. The OCC has taken full advantage in exploiting this judicial deference, as have its regulated entities. In banking regulatory cases raising preemption issues, the OCC has repeatedly filed amicus

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[14] OCC News Release 2002-10.

[15] "Dependent on Lender's Fees, the OCC takes Banks' Side Against Local Laws," *Wall Street Journal*, 1/28/02.

[16] One exception is the case of *Bowler v. Hawke*, 320 F.3d 59, 62-63 (1st Cir. 2003). The First Circuit found that an opinion issued by the OCC, which purported to declare certain Massachusetts insurance laws as preempted by the Gramm-Leach-Blilely Act, was "no more than informal agency guidance to banks and other interested parties," and did not "create a 'regulatory conflict' giving rise to a case or controversy . . ."

[17] *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)

briefs that uniformly promote the interests of the major national banks and oppose state consumer protection interests. Although some courts have questioned the OCC's motives,[18] most courts have felt bound to follow the OCC's preemption interpretations under the *Chevron* doctrine.

For example, in *Bank One, Utah v. Guttau,*[19] the OCC sided with a national bank and against the State of Iowa in opposing a state statute requiring that ATM owners maintain an Iowa office and that ATMs display the name, address and phone number of the owner. This latter requirement, intended to give consumers access to information that could help them resolve ATM operational problems, was characterized by the dissent as "a straightforward consumer protection measure."[20] Although the District Court found that the OCC's interpretation of the NBA was "unreasonable,"[21] the Eighth Circuit adopted the OCC's preemption position. In *Metrobank v. Foster,*[22] the OCC supported another national bank in opposing Iowa's prohibition against charging ATM fees that exceed the "interchange fees" paid to financial institutions by non-account holders.

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[18] *Wells Fargo Bank of Texas, N.A. v. James*, 321 F.3d 488, 494 (5th Cir. 2003).

[19] 190 F.3d 844 (8th Cir. 1999), cert. denied sub nom. *Foster v. Bank One, Utah*, 529 U.S. 1087 (2000).

[20] *Id.* at 851.

[21] *Bank One, Utah v. Guttau*, 1998 U.S. Dist. Lexis 14830 (S.D. Iowa, 1998).

[22] 193 F. Supp. 2d 1156 (S.D. Iowa 2002).

This year, in the case of *Wells Fargo v. James*,[23] the OCC again argued in support of a group of national banks opposed to a Texas consumer protection law. At issue in that case was a "par value" statute that prohibited any Texas bank from charging fees to cash checks drawn on that bank (known as "on us" checks). Texas contended that such check cashing charges fell disproportionately on the working poor, who often did not have their own bank at which to cash paychecks. Although the Fifth Circuit found in favor of the OCC's preemption position, it expressed concerns about the OCC's role:

> Here, the constituency positively affected by the OCC's position is concentrated, organized and well-funded, and also happens to be the regulated industry. In contrast, the constituency which is adversely affected by the decision, though vast, is diffuse, unorganized, and definitionally ill-funded. It may be that these competing interests could better be balanced, as Appellant suggests, by a national Congress whose commitments are diverse and universal, or even by the people as they are represented in the state legislatures, than by a solitary institution whose focus is a single industry.[24]

The breadth of the OCC's preemption position is revealed in recent interpretative letters issued by the Comptroller. In May 2001, the OCC issued opinions overriding Ohio and Michigan motor vehicle regulatory laws. In the Ohio opinion, the OCC authorized national

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[23] 321 F.3d 488 (5th Cir. 2003).

[24] *Id.* at 494.

banks to conduct sales of returned lease vehicles without complying with Ohio sales licensing laws.[25] Ohio law was preempted, according to the OCC, because the bank was authorized to sell the vehicles "in the manner most economically beneficial." In the Michigan opinion, the OCC found that a car dealer is not subject to the State's motor vehicle sales financing laws if a national bank is financing the sale.[26]

C. The OCC's Preemption Actions Interfere with State Consumer Protection Enforcement.

In addition to claiming that most state laws are inapplicable to national banks, the OCC essentially contends that the States do not have any consumer protection enforcement jurisdiction over national banks. The OCC does have explicit "visitorial powers" over national banks pursuant to the NBA,[27] The States therefore may not conduct bank examinations or engage in the direct supervision of a national bank. The OCC, however, is seeking to stretch the meaning of visitorial jurisdiction to block all investigations and enforcement actions directed at national banks.

The OCC has recently advised national banks to notify it if any bank is contacted by a state official, even if the state official is simply seeking information.[28] And although the visitorial powers provision in the NBA

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[25] 66 Fed. Reg. 23977 (5/10/01).

[26] 66 Fed. Reg. 28593 (5/23/01).

[27] 12 U.S.C. § 484.

[28] OCC Advisory Letter 2002-9, 11/25/02.

contains an express exemption for litigation ("except as . . . vested in the courts of justice"), the OCC, in a recent proposed rule on visitorial powers,[29] dismisses the States' right to seek legal remedies against national banks. The OCC would limit state enforcement actions to the filing of declaratory judgment actions aimed at determining whether or not the state law in question is preempted. If, then, the court finds against preemption, the OCC maintains that enforcement of a bank's compliance with the state law "is within the OCC's exclusive purview."[30]

In the past, state Attorneys General have brought consumer law enforcement actions against national banks with little controversy, just as attorney's representing private individuals have filed suit to obtain legal redress against national banks.[31] The States have routinely investigated consumer complaints against national banks and have reached formal and informal settlements with national banks. Until recently, most national banks cooperated in the resolution of these actions, and the OCC voiced no disapproval of state enforcement efforts.

In some of these actions, the States were targeting fraudulent or deceptive practices by a local retail seller. To obtain adequate relief for victimized consumers, the States have included as defendants the banking institutions that

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[29] 68 Fed. Reg. 6366 (2/17/03).

[30] *Id.* at 6370.

[31] *See, e.g., State of Alaska v. First National Bank of Anchorage*, 660 P.2d 406 (Alaska 1982); *State of Arizona v. Sgrillo*, 176 Ariz. 148, 859 P.2d 771 (1993); *State of Wisconsin v. Ameritech Corp.*, 185 Wis. 2d 686, 517 N.W.2d 705 (1994); *State of West Virginia v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995).

provided the financing for the questionable transactions. As the West Virginia Supreme Court noted in allowing the state Attorney General to maintain an action against a national bank that financed the allegedly unlawful sale of motor vehicle extended warranties:

> Logic and experience dictate that if the types of lawsuits which the Attorney General could bring under the CCPA did not include lawsuits against financial institutions such as defendants, these institutions could, if unsavory, run in effect a "laundry" for "fly-by-night" retailers that seek to excessively charge their consumers. Consequently, the real meaning of consumer protection would be stripped of its efficacy.[32]

The OCC has increasingly hardened its position against state enforcement rights in the past three years. In 2001, the Minnesota Attorney General brought a federal court case against Fleet Mortgage corporation under the FTC's Telemarketing Sales Rule[33] and the Minnesota Consumer Fraud Act. Minnesota alleged that Fleet Mortgage had engaged in a deceptive marketing scheme by providing customers' private account information to third party telemarketers selling memberships in buying clubs. Fleet also added the charges for the buying club sales to customers' mortgage loan accounts.[34]

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[32] *State v. Scott Runyan Pontiac-Buick, Inc., supra*, 461 S.E.2d at 526.

[33] 16 C.F.R. § 310 (promulgated pursuant to the federal Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101).

[34] *State of Minnesota v. Fleet Mortgage Corp.*, 158 F.Supp. 2d 962 (D. Minn. 2001).

Fleet Mortgage argued that only the OCC could enforce state consumer protection laws against it. The District Court rejected Fleet's motion to dismiss, holding that "[f]ederal law does not require that the OCC have exclusive enforcement over such actions. The OCC has no direct responsibility for enforcing non-banking state laws such as the [Minnesota consumer protection laws]."[35] Fleet, with the support of the OCC, brought a second motion to dismiss. The OCC, in its amicus brief, contended that neither Minnesota nor the FTC had any authority to enforce the Telemarketing Sales Rule against Fleet Mortgage because national banks are exempt from the Rule and the exempt status extended to non-bank subsidiaries like Fleet Mortgage. The District Court rejected the OCC's position: "The OCC's contention that it must have exclusive jurisdiction over subsidiaries in order to avoid having its authority 'restricted' is unpersuasive."[36]

There are other recent examples of States' consumer protection enforcement efforts against national banks, all of which the OCC would eliminate under its current preemption and visitorial powers stance. In some of these cases, the OCC has actively attempted to interfere with the state actions by advising banks that the States had no jurisdiction over them.

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[35] *Id.* at 966 (D. Minn. 2001).

[36] *State of Minnesota v. Fleet Mortgage Corp.*, 181 F. Supp. 2d 995, 1001 (D. Minn. 2001).

Beginning in 2001, a group of states, including California, Illinois, New York, and Florida, conducted an investigation into telemarketing operations by several major national banks. The banks had contracted with third-party telemarketers to share, for a fee, personal information about the banks' credit card customers and to provide access to bank customer billing information. The bank's name was then used in the telemarketer's sales pitch. The products sold were unrelated to the bank or to any banking services. The investigating states reached settlement agreements with Citibank and First USA despite the OCC's efforts to dissuade the banks from concluding such agreements. The OCC's view was that state Attorneys' General had no enforcement authority over national banks.

In other recent examples, the Kentucky and Indiana Attorneys General have settled alleged violations of state "Do Not Call" telemarketing law violations with a national bank. The State of Arizona brought a case against an air conditioning company and Household Bank for alleged deceptive sales and financing practices targeting Spanish-speaking customers. In 2002, the States of Illinois, Maryland, and Missouri investigated an unlicensed trade school for deceptive advertising. The States questioned a national bank's role in financing tuition payments but were advised by the bank that they were preempted. The OCC confirmed the bank's view, and informed the States that the OCC alone would determine if there had been any violation of state consumer protection laws by the bank.

The proposed rule, when coupled with the OCC's pending proposed rule on visitorial powers and other OCC

pronouncements, demonstrates that the OCC intends to divest the States of their traditional consumer protection enforcement jurisdiction over national banks.

D. The OCC's Proposed Rule and Other Recent Actions Undermine State Efforts to Attack Predatory Lending Abuses.

The OCC's recent preemption activity, including its order preempting Georgia's Fair Lending Law, is an unfortunate and unnecessary response to efforts by the States to control the problem of predatory mortgage lending. The States have taken a leadership role in addressing predatory lending, both in regulation and enforcement, and these state actions have been effective. The OCC should recognize and support these efforts and seek to cooperate in achieving a shared goal of a fair lending marketplace.

Instead, as demonstrated by its order on the Georgia law, the OCC has found conflicts with the National Bank Act in virtually every statutory anti-predatory lending consumer protection adopted by the States. The OCC has also gone beyond assessing the impact of these laws on national banks, and has attacked the usefulness of these laws even as they apply to non-depository institutions.[37] If national banks are not subject to state laws, and if national banks are not the problem, as the OCC repeatedly

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[37] *See* OCC News Release 2003-57 (7/24/03); OCC Working Paper, "Economic Issues in Predatory Lending," 7/30/03, available at: http://www.occ.treas.gov/workingpaper.pdf.

asserts, then the OCC should have no reason to undermine the States' predatory lending initiatives.

The OCC's efforts to deal with the very substantial problem of predatory lending, while a step in the right direction, fall short of the actions taken by many states. In the proposed rule, the OCC takes a token and minimalist approach. The OCC's proposal addresses only asset-based lending, which is just one of the many abusive practices present in predatory lending. If the OCC intends to supplant all state laws governing predatory lending as to national banks, it should substitute a regulatory regime that more comprehensively addresses the unfair practices that are well-documented in this area. The OCC did begin to adopt a more broad based approach in Advisory Letter 2003-2, in which it recommended that banks adopt guidelines to prevent predatory lending practices. However, the OCC's general guidelines were merely advisory, intended to "encourage" national banks to adopt appropriate policies and do not carry the force of formal rules. The OCC should continue to build on the standards identified in AL 2003-2 and promulgate meaningful and specific predatory lending controls.

In every recent pronouncement the OCC has made on predatory lending, it has pointed out that a group of state Attorneys General are on record saying that most predatory lending problems have come from non-depository subprime mortgage lenders, not national banks. These statements by a group of Attorneys General were made in comments supporting a rulemaking proceeding by the Office of Thrift Supervision under the Alternative

Mortgage Transaction Parity Act (AMTPA) and in an amicus brief filed in related litigation.[38] The Attorneys General supported the rational basis for OTS' distinction, in its revised AMTPA preemption rules, between "state housing creditors" and federally supervised banking institutions. The Attorneys General encouraged the OTS to revisit a prior preemption determination, and to require state housing creditors to comply with state laws regulating prepayment penalties and late fees.

It is true that most complaints and state enforcement actions involving mortgage lending practices have not been directed at banks. However, most major subprime mortgage lenders are now subsidiaries of bank holding companies (although not direct bank operating subsidiaries). Recent major settlements by state Attorneys General and the FTC related to alleged unfair lending practices by Household Finance and the Associates, both of which have now been acquired by bank holding companies. A national bank was a defendant in the only court case alleging class-wide violations of North Carolina's Predatory Lending Act.[39] Several national banks have partnered with payday lenders for the sole purpose of claiming preemption authority to make very high rate, short-term consumer loans in violation of state laws. (The OCC took effective action to curtail this latter practice, known as "charter renting.")

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[38] *National Home Equity Mortgage Association v. OTS*, No. 02-2506 (GK) (D.D.C. 2003).

[39] *Baxter v. Guaranty National Bank of Tallahassee*, 01 CV 9168 (Wake County, NC Superior Court). The bank contended that the North Carolina law was preempted as to a national bank but the case was settled before this issue was judicially resolved.

Based on these actions and other state consumer protection enforcement actions detailed above, it is clear that a national charter does not prevent a bank from engaging in unfair or deceptive practices.

State predatory lending laws have clearly identified unfair and deceptive lending practices and have imposed specific, appropriate requirements to protect consumers. The States that have enacted legislation have been sensitive to federalism concerns and have been careful not to impose direct restrictions on the rates and fees that nationally chartered lenders (or any lender) may charge. The objective in all states has been to narrowly target abusive practices and to cover only the more problematic reaches of the subprime marketplace, where borrowers are unsophisticated and where most of the problems have occurred.

Responsible lenders do not engage in the practices targeted by state predatory lending laws. These laws impose minimal burdens on legitimate lending institutions and do not impair any reasonable lending activity on the part of banks. The laws, by controlling the most abusive actors, serve to clean up the mortgage lending marketplace and restore consumer confidence, which benefits consumers and lenders alike.

In fact, many state predatory lending controls have now been voluntarily adopted by national subprime lenders. The prohibition on financing single premium credit insurance, which was considered controversial when it was included in North Carolina's 1999 law, has been accepted and implemented nationally by all of the major finance company mortgage lenders. The prohibition against flipping and the related "net tangible benefit" test,

which was questioned by some lenders when it was introduced in North Carolina, also has been voluntarily adopted as a useful standard. Leading subprime lenders also have imposed restrictions on exorbitant points and origination fees, which were among the primary abuses identified in state predatory lending laws. Far from restricting the flow of credit, the predatory lending controls initially adopted by several states have become useful as bright line industry standards on a nationwide basis.

Despite the success and acceptance of state predatory lending laws, the OCC has declared every significant component of such laws to be impermissible burdens on national banks. In its order preempting the Georgia law, the OCC finds even the most non-controversial and widely accepted provisions to interfere with banks' ability to lend and therefore to be in conflict with the National Bank Act. As an example, no reasonable person would contend that encouraging a borrower to default on an existing loan is an acceptable lending practice. But just such a practice has been used by unscrupulous lenders or brokers to lead borrowers into a desperate delinquency situation, so that the borrowers then fall prey to whatever terms the lender dictates. Widely recognized as an unfair trade practice, encouraging default is prohibited by state predatory lending laws. Yet the OCC found this prohibition in the Georgia law to be preempted because it imposed impermissible restrictions on, and interfered with "the exercise of the Federal power of national banks to make real estate loans."[40] The OCC also declared restrictions on other

[40] 68 Fed. Reg. 46278 (8/5/03).

practices, such as negative amortization and financing of prepaid credit insurance premiums, and the requirements for high cost loan borrowers to receive credit counseling, to be similarly preempted.

If national banks do not routinely engage in practices such as encouraging default or using negative loan amortization, it is difficult to see how these consumer protections impede any bank's ability to lend. Yet under the proposed rule, any state law provision is preempted if it, among other things, 1) restricts lender's ability to require insurance; 2) regulates anything relating to the terms of credit, including loan amortization or loan acceleration; 3) requires any disclosures; or 4) regulates advertising.

The OCC recognizes that national banks are subject to Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive trade practices.[41] Most states have similarly worded consumer protection statutes, many modeled on the FTC Act. If national banks are prohibited from engaging in unfair and deceptive practices under federal law, then it should be no impediment for them to comply with state laws proscribing the same unlawful practice. State predatory lending acts apply the States' unfair and deceptive practices regulatory authority to the field of mortgage lending. These statutes give further definition and more precise guidelines for lenders on fair conduct in making mortgage loans to consumers.

In the experience of the States, lenders welcome bright line tests more than general proscriptions against

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[41] 15 U.S.C. § 45(a)(1).

unfair conduct. However, in adopting its own very limited restrictions on predatory lending, the OCC falls back on compliance with the FTC Act as a standard for lenders to follow. The OCC would be better advised to fall back on the numerous state laws and regulations in this area and to develop more useful rules for the benefit of the banking industry and consumers alike. The OCC also should insist that national banks comply with state predatory lending laws unless there is compelling evidence that such compliance substantially interferes with a bank's ability to make real estate loans.

E. The OCC Has Exceeded its Authority in Extending Preemption Rights to the Operating Subsidiaries of National Banks.

The OCC's proposal to apply its overly broad preemption rules to operating subsidiaries of national banks clearly exceeds its authority under the National Bank Act. The proposal would do great damage to the state-federal dual banking system, and should be withdrawn.

Operating subsidiaries are not national banks subject to a national charter; they are state-created entities incorporated under state law and have been licensed and regulated by the States for years without controversy. Nothing in the NBA grants the OCC power to bar states from licensing, examining and otherwise regulating state-created non-bank entities that happen to be subsidiaries of national banks. Nevertheless, the OCC now proposes that operating subsidiaries of national banks should have the same legal and regulatory status as the national banks themselves, contending that these subsidiaries are effectively departments, divisions or equivalent parts of the banks.

The OCC proposes to federalize state-chartered subsidiaries by placing them within the exclusive supervisory control of the OCC. Under the OCC's proposal, the States would be deprived of all authority to regulate these state-chartered corporations, which include mortgage companies that have long been licensed by States. The OCC proposal intrudes upon the States' sovereign powers and exceeds the boundaries of federal authority under the Tenth Amendment. It attempts to convert state-chartered corporations into creatures of federal law without permission of the chartering states.[42]

According to the OCC, a state law is exempted from preemption only if it is expressly incorporated into the federal banking laws or has no more than an "incidental" effect on banking activities. The OCC, however, considers mere inconvenience to a subsidiary of a national bank to be a conflict between federal and state law. As indicated by amicus curiae briefs filed by the OCC across the country, this overreaching standard would lead to the preemption of nearly all state licensing and regulatory laws. The preemption of state licensing laws, including the ability to license and examine mortgage lending entities, is not sound public policy. It would encourage financial institutions to give up their state charters, and to instead, seek either to obtain federal charter or to merge with a national bank, effectively destroying the dual banking system that is valued by both Congress and the States.

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[42] *Hopkins Federal Savings & Loan Ass'n v. Cleary*, 296 U.S. 315 (1935).

Operating subsidiaries historically have been regulated by States under their respective laws and relevant regulatory regimes and are in no manner considered "national banks" by the NBA. Moreover, the NBA provides absolutely no basis for ignoring the corporate distinctions between a parent national bank and its subsidiary. In an area where, as here, state law traditionally has applied, Congressional intent to preempt state law must be clearly manifested.[43] There is no such intent expressed anywhere in the NBA, and the OCC's proposal is, in fact, contrary to Congressional intent, expressed most recently in the legislative history of the Riegle-Neal Interstate Banking Act.[44]

Additionally, the NBA provides stringent requirements for banks to qualify as national banks. None of these requirements apply to their state-chartered and state-regulated operating subsidiaries. Instead, as creatures of state law, operating subsidiaries should comply with applicable state law requirements.

Moreover, the States have long held an unquestioned primacy in regulating state-chartered corporations, particularly including companies that engage in consumer financial services. Courts have repeatedly upheld States' authority to exercise comprehensive supervision over the corporations they charter and to license and regulate corporations chartered by other states that transact

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[43] *English v. General Electric Co.*, 496 U.S. 72, 74 (1990); *California v. ARC American Corp.*, 490 U.S. 93, 101 (1989); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

[44] See discussion in Section II.B. at pp. 4-5 above.

business within their borders. As affirmed by the Supreme Court, "No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations."[45] The fact that a state-chartered corporation is an affiliate of a national bank does not alter the principles of federalism that grant States the right to regulate corporations chartered under their laws. Indeed, in a case where the OCC similarly engaged in an overly aggressive interpretation by the OCC of the NBA, a federal circuit court of appeals concluded that "to defer to the OCC in this case would flout Congressional intent – something we remain unwilling to do."[46]

The OCC's claim of exclusive supervisory powers over operating subsidiaries is contrary to both this nation's dual system of banking and the historic primacy of the States in matters of corporate governance. The OCC's broad assertion of field preemption has no basis in any of the federal legislation that provide that agency with its regulatory authority. Like the OCC's claims of complete preemption with respect to national banks, the OCC's proposal to extend its hegemony to banks' operating subsidiaries wholly exceeds any reasonable interpretation of the regulatory powers given to the OCC by national banking laws. The OCC's proposal to create such a sweeping standard of preemption and to bar the States from regulating subsidiaries of national banks created under state laws directly violates Congressional intent, federal law and the Tenth Amendment to the Constitution.

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[45] *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89 (1987).

[46] *American Land Title Association v. Clarke*, 968 F.2d 150, 157 (2d Cir. 1992).

In conclusion, the OCC's proposed rules represent a significant expansion of preemption standards and a restructuring of the federal-state balance that has existed for many years, particularly in the area of consumer protection. For the reasons expressed above, we urge the OCC to withdraw the proposed rules.

We thank you for the opportunity to submit these Comments. If you have questions or comments, please do not hesitate to contact Sarah Reznek, NAAG's Consumer Protection Project Director, at (202) 326-6016 or Blair Tinkle, NAAG's Legislative Director, at (202) 326-6258.

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In the
Supreme Court of the United States

CHEVY CHASE BANK, FSB., et al.
Petitioners,

v.

DALE WELLS, et al.,
Respondents.

On Petition for a Writ for Certiorari to the Maryland Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT FOR CERTIORARI

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STATEMENT OF THE CASE

Petitioner Chevy Chase, F.S.B. ("Chevy Chase") has issued credit cards to thousands of customers nationwide. Prior to 1996, Chevy Chase had its headquarters in Maryland, where a state usury statute caps credit card and other interest rates at 24%. In its agreements with its card holders ("the Maryland Agreement), Chevy Chase acknowledged this cap and specifically promised that it would "never" raise their interest rates over 24%.

In the Maryland Agreement, Chevy Chase also contracted to amend the Maryland Agreement only "in accordance with applicable law." The contract further specified that it was "governed by Subtitle 9 of Title 12 of the Commercial Law Article of the Maryland Annotated Code and applicable federal laws." Subtitle 9 requires, *inter alia*, notice of amendments to the cardholder with the opportunity to decline the amendments and terminate the card holder agreement.[1]

In January 1996, Chevy Chase announced in its billing

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[1] Subtitle 9 obligates any credit grantor to provide notice of any proposed amendments to plan provisions regarding interest rates, finance charges, or any other fees charged to its customers, along with a statement that a second notice will be sent in the card holder's next billing statement. Md. Code Ann., Comm. Law I, §12-912(b). The first notice must be sent in an envelope bearing on its face, in 10 point type, a statement "that an important notice of an increase in rates or fees" is enclosed. *Id.* § 12-912(b)(8). The second notice must contain the same substantive information as the first notice and be presented in the same format. *Id.* § 12-912(c)(2). Subtitle 9 also obligates credit grantors to provide card holders notice of their right to refuse to accept new contract terms. *See id.* §12-912(b)(7).

statements that it was officially changing its headquarters to Virginia. It then attempted to replace the Maryland Agreement with a new and different one ("the Virginia Document"). Under the terms of the Virginia Document, interest rates are not subject to a maximum limit. Chevy Chase then raised interest rates well over 24%. The Virginia Document also increased late fees from $15 to $20 and imposed an entirely new $20 penalty if a card holder exceeds his or her credit limit. Chevy Chase did not include any of the statements required by Subtitle 9 in the Virginia Document, the mailing envelope or the billing statement in which it was enclosed, and it did not second the second required notice.

An extensive and undisputed factual record establishes that Chevy Chase buried the notice of this amendment in a manner that ensured that it was not noticed by consumers. A marketing expert testified that the amendments were communicated in a method that was "ineffective from a communications standpoint. In other words, the vast majority of Chevy Chase's card holders were unlikely to notice or become aware of this change to their cardholder agreement." The named plaintiffs also testified that they had never seen the Virginia Document, and evidence of a sample of 136 card holders demonstrated that not a single one of these customers recalled seeing the Virginia Document.

This putative class action was filed in Maryland state court in 1999. The card holder plaintiffs allege that Chevy Chase breached its contracts with its card holders by raising the interest rates above 24% and imposing various other new or higher fees upon the card holders.

After the consumer plaintiffs filed their complaint and discovery requests, the case became bogged down over Chevy Chase's claim that the plaintiff consumer card holders were required to arbitrate their claims. The Maryland Court of Appeals unanimously held that Chevy Chase's contract did not permit it to force plaintiffs into arbitration. *Wells v. Chevy Chase Bank*, 768 A.2d 620 (Md. 2001).

The case was remanded to the trial court for proceedings on the merits. The plaintiffs propounded discovery requests relating to the reasons that Chevy Chase drafted the card holder agreement to refer to Subtitle 9, and Chevy Chase refused to respond on the grounds that the requested information was irrelevant.

Chevy Chase moved to dismiss the entire action on the ground that plaintiffs' claims are preempted by the Home Ownership Lending Act ("HOLA") and the Office of Thrift Supervision ("OTS")'s regulations promulgated under that Act. In connection with its motion to dismiss, Chevy Chase argued that when it had drafted the reference to Subtitle 9 in the card holder agreement, it had only intended that reference to refer to the provisions of Subtitle 9 relating to interest rates, not the provisions of Subtitle 9 relating to the notice to be provided to class members. Chevy Chase offered no evidence to support this statement about its intentions, but reaffirmed its position that it would not respond to discovery on the topic as it was irrelevant.[2] The trial court dismissed the case on the grounds

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[2] In the Petition for Certiorari, Chevy Chase again argues that it have never intended to follow the notice provisions of Subtitle 9. Pet. at 3 n. 1.

that HOLA preempted plaintiffs' contract claims.

The Maryland Court of Appeals reversed the trial court, finding that plaintiffs' breach of contract claims were not preempted. The Court of Appeals noted that the OTS regulations contain an express exemption from preemption for contract actions, App. 22a, and that this Court had rejected the idea that preemption applied to terms voluntarily agreed to in private contracts in *American Airlines v. Wolens*, 513 U.S. 219 (1995). App. 27a. The Court noted that there was no conflict with federal law if Chevy Chase chose to comply with Subtitle 9, App. 35a, and left to the trial court the question of whether Chevy Chase did choose to comply with Subtitle 9 in the contract. App. 42a. Chevy Chase has subsequently moved for summary judgment on that contract interpretation issue. Chevy Chase's brief in support of its motion makes many of the same arguments in support of its position on contract interpretation that Chevy Chase's Petition for *Certiorari* makes in support of its federal preemption arguments.

SUMMARY OF ARGUMENT

The Petition for *Certiorari* should be denied because the decision below is not a final judgment or decree within the meaning of 28 U.S.C. § 1257(a). The decision merely reverses a trial court opinion granting a motion to dismiss, and no state court has yet passed upon the merits of the parties' positions on contract interpretation, class certification, damages or the like. This case falls into none of the four prudential exceptions that that this court recognized to the § 1257(a) finality rule in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1974). This Court should not exercise its jurisdiction over this case on the ground

that Chevy Chase is afraid that at some future point it may lose on its contract defenses in the state court.

Even if the decision below were a final decision, however, this case does not justify a grant of *certiorari*. Chevy Chase claims that the decision below contradicts the decisions of this Court. This Court has directed, however, that federal law does not bar a party from agreeing to follow a state law that would otherwise be preempted, *unless* the promise itself would conflict with federal law. *See American Airlines v. Wolens*, 513 U.S. 219, 228 (1995). In *Wolens*, this Court explained that federal preemption involves the *imposition* of state law upon a party, not obligations voluntarily undertaken. *Wolens*' holding demonstrates that Chevy Chase's real concern is with the interpretation of its contract, because if the plaintiffs are right that Chevy Chase voluntarily chose to promise to comply with all of Subtitle 9, then *Wolens* conclusively establishes that there is no federal preemption. Whether the Maryland courts will agree that Chevy Chase voluntarily chose to comply with Subtitle 9 is yet to be seen.

Chevy Chase argues in its Petition that *Wolens* does not apply, because *Wolens* did not involve a choice-of-law clause. Chevy Chase's proposed distinction of Wolens fails for two reasons. First, it does not respect the Court's underlying rationale – if the choice-of-law provision here can be fairly interpreted under the normal principles of contract interpretation to find that Chevy Chase voluntarily agreed to comply with Subtitle 9, then Subtitle 9 was not "imposed" upon Chevy Chase and there can be no federal preemption. In this case, the specific language of the agreement drafted by Chevy Chase makes such an interpretation reasonable.

Second, this Court has held previously that a party can agree to follow an otherwise preempted state law through the operation of a choice-of-law provision. In *Volt Info. Sciences v. Bd of Trustees*, 489 U.S. 468 (1989), the Court affirmed a state court ruling that a party had agreed in a choice-of-law provision to follow California law even though federal law might have dictated a different result.

Chevy Chase claims that the decision below conflicts with this Court's decision in *Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141 (1982). *De la Cuesta* is distinguishable on two grounds. First, unlike this case, *De la Cuesta* involved a generic choice-of-law provision that referred generally to the law of a state, but that did not identify any particular state statute. Second, *De la Cuesta* involved a body of state law that conflicted with federal law. This Court noted that an enumerated federal regulation specifically permitted banks to include certain clauses in their contracts, and that the state law that the plaintiffs claimed was incorporated by the generic choice-of-law provision directly conflicted with that regulation. In this case, by contrast, there is no conflict between the purpose or operation of federal law and Chevy Chase giving the sort of notice specified in Subtitle 9.

Chevy Chase argues that this Court should grant *certiorari* because there is a conflict on questions of federal law between the opinion below and several decisions from lower federal courts. In fact, none of the cases cited by Chevy Chase constitute genuine conflicts with the decision below. First, the language of the choice-of-law provision in this case is uniquely specific. Chevy Chase cites to several cases that involve general choice-of-law provisions that refer to all of the laws of

a state, but do not specifically promise to comply with any particular state statute or law. The choice-of-law provision involved in this case, by contrast, specifically identifies by citation a particular state statute that specifies the manner that a credit card issuer must give notice of changes in the terms of an agreement.

In addition, most of the cases cited by Chevy Chase are not based on any discussion of principles of federal preemption, but are merely exercises in the interpretation of contracts. Accordingly, rather than identifying a genuine conflict on principles of law, all Chevy Chase has demonstrated is that different courts interpreting different contracts (that use different language) have reached different conclusions about what the parties to those contracts intended. This hardly justifies the exercise of this Court's jurisdiction.

Third, several of the cases cited by Chevy Chase as conflicting with the opinion below involve contractual promises whose enforcement would have conflicted with the operations and goals of federal law. In this case, by contrast, it would not conflict with federal law for a lender to voluntarily agree to comply with Subtitle 9.

Chevy Chase also claims that the decision of the Court below contradicts the regulations of the OTS, which Chevy Chase claims occupy the field. It is true that OTS has said that its regulations preempt the field, but those regulations include a savings clause that specifically exempts contract claims from this field preemption. Chevy Chase's only response, again, is to assert that the plaintiffs' claims are not really contract claims because it never really intended to promise to follow state law.

Finally, Chevy Chase closes with dire predictions of disaster if the opinion below is not overturned. These predictions, like Chevy Chase's federal preemption theory, arise from the assumption that no honest court could interpret the choice-of-law provision in this case as evidencing an intention to comply with Subtitle 9. Chevy Chase conjures up a grim vision of results-oriented state courts dishonestly misinterpreting contracts in order to circumvent the OTS. *See, e.g.*, Pet. at 7 (expressing fear that state courts will use the 'back door of 'contract interpretation'" to serve their "vested interests.") These attacks upon state courts are insulting and without basis. Indeed, as this opposition will establish, the most reasonable reading of the language of the contract in this case demonstrates that Chevy Chase did promise to and intend to follow all of Subtitle 9.

REASONS FOR DENYING THE WRIT

I. THE COURT HAS NO JURISDICTION TO REVIEW THE MARYLAND COURT OF APPEALS' INTERLOCUTORY ORDER.

The petition should be denied for want of this Court's jurisdiction. Congress has limited this Court's authority to review State-court decisions to those cases where a State court's judgment is final. The jurisdictional statute provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . ." 28 U.S.C. § 1257(a). This provision creates a "firm final judgment rule," under which a State court's decision must be final in two senses to be reviewable: "it must be subject to no further review or

correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 81 (1997) (citation omitted). Here, the State court's decision below is not final because it rejected Chevy Chase's preemption defense and remanded the case for further proceedings on the merits of the plaintiffs' breach of contract claims. Therefore, this Court does not have jurisdiction to review the State court's decision at this time.

This case does not fall within any of the four prudential exceptions to Section 1257's finality requirement that this Court has recognized. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-85 (1974) (listing and explaining exceptions). First, this is not a case where "the federal issue is conclusive and the outcome of further proceedings preordained." *Id.* at 479. To the contrary, the Maryland Court of Appeals declined to finally answer the contract interpretation question that will determine the merits of the plaintiffs' breach claims, Pet. App. at 35a n.13, and instead remanded the case to the trial court for further proceedings on this and other issues. Pet. App. at 42a. Since the outcome of the state court litigation on the merits of the contract interpretation and breach questions is not preordained, the first *Cox Broadcasting* exception does not apply here.

For largely the same reason, the second exception also does not apply since this is not a case where "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting*, 420 U.S. at 480. The federal preemption issue is not guaranteed to survive the State-court proceedings on remand because a ruling for Chevy Chase

on the contract interpretation and breach issues would moot the bank's preemption defense. *See, e.g., Jefferson v. City of Tarrant*, 522 U.S. at 82 (finding lack of jurisdiction in part because "[r]esolution of the state-law claims could effectively moot the federal-law question raised here.") Since either the plaintiffs or Chevy Chase could prevail on the state law issues to be litigated on remand, neither of the first two *Cox Broadcasting* exceptions to Section 1257's finality requirement applies here.

Likewise, the third *Cox Broadcasting* exception does not apply because this case does not involve a situation where "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the outcome of the case." *Cox Broadcasting*, 420 U.S. at 481. In *Cox Broadcasting*, the Court described this exception as applying to cases where there are legal impediments that could prevent a party from appealing an adverse judgment, such as in a criminal case where a State would be barred on remand from appealing after an acquittal. *Id.* at 481-82. There are no such legal impediments here because, even if the Maryland courts adhere to the ruling below as "law of the case," that would not bar Chevy Chase from seeking review on the federal issue after there is a final State-court judgment. *See Jefferson v. City of Tarrant*, 522 U.S. at 82-83.

Finally, this is not a case where the fourth *Cox Broadcasting* exception applies. The fourth exception applies in cases where, even though the party seeking review could prevail on the merits on non-federal grounds in the state court proceedings on remand, this Court's immediate review is

nonetheless deemed necessary because "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox Broadcasting*, 420 U.S. at 482-83. The Court has applied this exception in cases where the federal law issue concerned the proper forum for resolving the merits of a dispute so that delayed review in deference to state court proceedings would effectively erode the federal policy interest at issue regardless of the outcome on the merits. *Id.* at 483 (describing prior case law). The Court has also applied this exception in First Amendment cases, such as *Cox Broadcasting* itself, where the delayed resolution of an "important question of freedom of the press under the First Amendment" would "leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt." *Id.* at 486. At the same time, however, the Court has rejected a state's attempt to invoke this exception in a case involving Fourth Amendment search-and-seizure issues, finding instead that "the State can make no claim of serious erosion of federal policy that is not common to all run-of-the-mine decisions suppressing evidence in criminal trials." *Florida v. Thomas*, 532 U.S. 774, 780 (2001).

The fourth *Cox Broadcasting* exception to Section 1257's finality requirement does not apply here because the federal law question at issue does not implicate the propriety of state court proceedings in this case and does not allege a serious erosion of federal policy. The only imaginable argument that Chevy Chase might propose as to how this case constitutes an erosion of federal policy would be if it would conflict with federal law for Chevy Chase to promise – and then keep its promise – to follow Subtitle 9.

In fact, there is no conflict between the making and keeping of this promise and federal law. Chevy Chase has acknowledged, Pet. at 9, that it could have both promised to follow and actually followed Subtitle 9 without any conflict with federal law. While Chevy Chase asserts that express language was necessary to make such a promise, the existence of a conflict between federal and state law cannot depend upon the presence of any "magic words." In addition, the federal statute relied upon by Chevy Chase, HOLA, does not address how notice must or may be given of credit card contract amendments. Nor do the OTS regulations. In fact, the OTS itself has recognized in the context of home loans that loan adjustments or amendments must be made the subject of lender contracts since they are not the subject of federal laws. "The OTS believes that as long as information about adjustments to interest rates, terms, payment . . . is clearly disclosed to purchasers, the details should be a matter of contract between the savings association and the purchaser." 61 Fed. Reg. 1166 (January 17, 1996). While the Truth in Lending Act ("TILA") imposes some limited requirements upon lenders, there is no question that TILA does not preempt state regulations, much less bar lenders from voluntarily undertaking to exceed its requirements. *E.g. Williams v. First Gov't Mort. & Investors Corp.*, 176 F.3d 497, 500 (D.C. Cir. 1999) ("Nothing in TILA or its legislative history suggests that Congress intended the Act's disclosure regime to provide the maximum protection to which borrowers are entitled nationwide; states remain free to impose greater protections for borrowers.")

In sum, it is clear that Chevy Chase's Petition is premature, and that this case is not ripe for this Court's review.

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

A. THIS COURT HAS HELD THAT FEDERAL PREEMPTION ONLY APPLIES TO POSITIVE STATE LAW REQUIREMENTS, NOT TO STATE LAWS ENFORCING VOLUNTARY CONTRACTUAL PROMISES.

Chevy Chase claims that the decision below conflicts with decisions of this Court. In fact, the decision below is compelled by this Court's decisions that differentiate between obligations that arise as a matter of state *law*, and obligations that arise out of contracts a party has chosen to enter. In *Wolens*, 513 U.S. at 228, this Court distinguished between "state-imposed obligations," and a party's "own self-imposed undertaking,"and held that the latter category of claims were not the subject of federal preemption. "This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to this agreement." *Id. Cf. Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 526 (1992) (plurality opinion) ("[A] common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement . . . imposed under State law' within the meaning of [Federal Cigarette Labeling and Advertising Act]."). Plaintiffs' here raise claims based upon what Chevy Chase "itself undertook," and not upon any dictates of the State of Maryland.[3]

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[3] Notwithstanding Chevy Chase's claims of a deep divide in the law, these principles has been regularly followed by the lower courts. *See*

Chevy Chase doggedly refuses to grasp this distinction. It argues, Pet. at 2, that the decision below "imposed [Subtitle 9] on a federal lender." As *Wolens* establishes, however, there is no federal preemption here if *Chevy Chase* chose to voluntarily *impose* these requirements of Subtitle 9 *upon itself.* The only remaining question is one of contract interpretation, because if plaintiffs' contract claims are correct, Chevy Chase chose to draft a contract undertaking to follow Subtitle 9 with respect to notices of amendments to its cardholder agreements. In this case, Subtitle 9 is not a state law or policy "external" to the contract, but is instead – through its incorporation by express reference – a consensual term of the contract.

Michael v. Shiley, Inc., 46 F.3d 1316, 1323 (3d Cir. 1995) (express warranty claims not preempted by Medical Device Amendments of 1976 because they "arise from the representations of the parties which are made the basis of the bargain and do not result from the independent operation of state law. . . .") (citations and footnotes omitted); *Ass'n of Int'l Auto. Mfrs. v. Commissioner, Mass. Dep't of Environmental Protection*, 208 F.3d 1, 7 (1st Cir. 2000) (holding that provisions set forth in a contract are not preempted by Clean Air Act, and noting that "Supreme Court precedents holding that federal preemption is generally confined to formal state laws and regulations and not applicable to contracts and other voluntary agreements"); *ProCd, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996) (holding that enforcement of private contracts relating to computer software is not preempted by Federal Copyright Act and noting that "courts usually read preemption clauses to leave private contracts unaffected"); *Cent. States Health & Welfare Fund v. Pathology Labs.*, 71 F.3d 1251, 1254 (7th Cir. 1995) ("[j]ust as the Federal Aviation Act does not preempt enforcement of contracts that set the effective price of air transportation [citing *Wolens*], so ERISA does not preempt enforcement of contracts that specify who pays how much to whom for medical care").

B. VOLUNTARILY UNDERTAKEN CONTRACTUAL OBLIGATIONS DO NOT SUDDENLY BECOME PREEMPTED MERELY BECAUSE THEY ARE CONTAINED IN A CHOICE-OF-LAW PROVISION.

Chevy Chase seeks to distinguish *Wolens* on the ground that the contract claim in *Wolens* was not based on a choice-of-law provision. Pet. at 5, 10. This distinction fails for several reasons. First, it assumes that Chevy Chase is correct in its contract interpretation argument and that Chevy Chase did not actually intend to comply with Subtitle 9. In fact, it would be entirely reasonable if the state court below were to find that Chevy Chase's specific promise to comply with Subtitle 9 obligated Chevy Chase to do so. Second, this Court has previously affirmed a decision in which a state court held that a party had promised to comply with an otherwise preempted state law by referring to that law in a choice-of-law clause.

Chevy Chase's attempted distinction of *Wolens* is meaningful only if one starts with the assumption that any decision interpreting any choice-of-law decision as obligating a bank to follow an otherwise preempted state law is necessarily illegitimate as a matter of contract law. This assumption is debunked in Part V of this Opposition, below. Where a choice-of-law provision is in fact intended to incorporate an otherwise preempted state law, *Wolens* dictates that federal law does not preempt the application of such a provision.

Chevy Chase argues that *Wolens* does not apply here, because *Wolens* distinguished between contractual obligations and "policies external to the agreement." Pet. at 10, citing

Wolens, 513 U.S. at 233. Chevy Chase assumes that in the context of this case, Subtitle 9 is a "policy external to the agreement," rather than an actual term of the agreement. There is no support in *Wolens* for this assumption, however. The context of the passage is a sentence discussing "[t]his distinction between what the State dictates and what the airline itself undertakes. . . ." *Id.* at 233. This Court was distinguishing between obligations that are external to the contract and are imposed by a state through a statute, regulation or judicial decision, and obligations that arise through a party's self-imposed undertaking. In short, the reasoning that underlay the Court's decision in *Wolens* is just as applicable to contractual obligations voluntarily undertaken in a choice-of-law provision as it is to obligations undertaken in language that expressly enumerates those obligations.

In addition, this Court has rejected Chevy Chase's argument that no choice-of-law provision can ever be found to obligate a party to follow state law rather than federal law. In *Volt Info. Sciences*, 489 U.S. 468, this Court gave effect to a choice-of-law provision in an arbitration agreement which stated that the contract would be governed by the law of the "place where the Project is located." The question in *Volt* was whether the contract at issue should be governed by the California Arbitration Act, which contains a provision allowing a court to stay arbitration pending resolution of related litigation, or by the Federal Arbitration Act ("FAA"), which does not contain any provision regarding arbitration stays. *Id.* at 470-72. Absent the choice-of-law provision, the contract would have been governed by the terms of the FAA. This Court affirmed the lower court's finding that the choice-of-law provision rendered the contract subject to the stay provisions of

the California statute. This result cannot be squared with Chevy Chase's theory that choice-of-law provisions may never obligate a party to comply with otherwise preempted state laws. Indeed, this case goes one step better than *Volt*, insofar as the cardholder agreements at issue here contain a highly specific reference to a particular provision of state law, rather than a vague reference to the "law of the Place."[4]

C. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S HOLDING IN *DE LA QUESTA*.

Chevy Chase argues that this Court must find that plaintiffs' claims are preempted due to this Court's decision in *de la Cuesta*, 458 U.S. 141. The preemption analysis of *de la Cuesta* has no bearing here, however, as the facts of that case are readily distinguishable from this one. First, *De la Cuesta* involved a generic choice-of-law provision that did not refer to or cite any particular state law. Second, *De la Cuesta* involved a direct conflict between a state law that prohibited due-on-sale clauses in mortgage agreements and an OTS regulation that explicitly permitted such clauses and expressly preempted any contrary state law. *See id.* This Court held that the federal regulation preempted application of the California law, stating that "state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with

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[4] This Court also directed in *Volt* that "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." 489 U.S. at 474. The only exception that this Court noted was where a state contract interpretation might interfere with federal rights, an exception that does not apply here.

federal and State regulations is a physical impossibility.'" *Id.* at 152. In this case, as set forth above, there is no physical impossibility or other conflict.

Chevy Chase argues that it does not matter that the conflict preemption analysis of *de la Cuesta* does not apply here because there is preemption under a different theory – that HOLA and the OTS regulations preempt the entire regulatory field. This argument is without merit. Even if one assumes that the OTS regulations preempt the field,[5] that preemption only extends to state *laws*, meaning state-imposed obligations. *See, e.g.*, Section 560.2(a). The OTS regulations specifically exclude claims based upon state contract law. 12 C.F.R. § 560.2(a). This exception draws the same distinction that this Court did in *Wolens* between obligations that are "externally" imposed upon lenders by state law, and those obligations that are "self-imposed undertakings."

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[5] In fact, this Court did not hold that this field is preempted in *de la Cuesta*. *See id.* at 159 n.14 ("[b]ecause we find a direct conflict between federal and state law, we need not decide whether the HOLA or the Board's regulations occupy the field of due-on-sale law or the entire field of federal savings and loan regulation."); *id.* at 171-72 (O'Connor, J., concurring). In addition, the OTS's Chief Counsel has advised that HOLA does not preempt traditional contract law. OTS Op. Chief Counsel (December 24, 1996).

III. THERE IS NO SPLIT OF LOWER COURT AUTHORITY WARRANTING THIS COURT'S REVIEW.

No other court in the U.S. has examined the question faced by the Court below: does federal law bar a savings bank from promising to follow a state statute through a very specific choice-of-law clause that identifies that particular state statute by its citation, where it would not conflict with federal law for the bank to perform the acts set forth in the statute. Nonetheless, Chevy Chase claims that the decision of the Maryland Court of Appeals in this case conflicts with a number of decisions by lower federal courts. In fact, not one of the cases cited by Chevy Chase conflicts with the decision below. Each of the cases cited by Chevy Chase is readily distinguishable on at least one of two grounds.

First, the terms of the choice-of-law provisions involved in the cases cited by Chevy Chase are different in a number of respects from the contract involved in this case. In case after case cited by Chevy Chase, the contracts contained a "generic" choice-of-law clause – a clause referencing state law generally, without specifying precisely which provision or subchapter of state law is to be incorporated into the contract.

Chevy Chase repeatedly cites the case of *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287 (3rd Cir.), *cert. denied*, 122 S. Ct. 545 (2001), for example, as an illustration of a case that conflicts with the decision below. Pet. at 13, 17, 19 and 21. The contract in *Roadway* stated that the agreement "shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania." 257 F.3d at 290.

The Court held that "the presence of a generic choice-of-law clause tells us little (if anything) about whether contracting parties intended to opt out of the [federal statute's] default standards and incorporate ones borrowed from state law . . .." Accordingly, the Court held that the parties had not intended to incorporate state law on the question. In this case, by contrast, Chevy Chase's cardholder agreement contains a highly specific reference to "Subtitle 9 of Title 12 of the Commercial Law Article of the Maryland Annotated Code." Unlike the generic reference to "the laws of the Commonwealth of Pennsylvania" at issue in *Roadway*, there is no ambiguity about the promise to comply with Subtitle 9.

This distinction is decisive. Far from conflicting with the opinion below, *Roadway* strongly supports the conclusions of the Maryland Court of Appeals. The Third Circuit recognized that a *specific* reference to a particular state statute in a contractual choice-of-law provision *should* be given full force and effect notwithstanding contrary standards set forth in a federal statute. *See id.* at 297 (noting that, if the contract at issue had stated that "any controversy shall be settled by arbitration in accordance with the terms of the Pennsylvania Uniform Arbitration Act," then the standards of the Pennsylvania law would have displaced the FAA's default standards). The Governing Law provision of Chevy Chase's cardholder agreement meets precisely the standard for specificity that the Third Circuit said was necessary to create a binding obligation. Accordingly, *Roadway* confirms the conclusion of the Court below.

This same point can be made in nearly all of the cases cited by Chevy Chase. In *Atkinson v. General Electric Credit*

Corp., 866 F.2d 396 (11th Cir.), *cert. denied*, 493 U.S. 815 (1989), Pet. at 12-13, for example, the contractual choice-of-law provision merely stated that the contract would be governed by the laws of Georgia. No specific state statute was enumerated. *Brown v. Investors Mortgage Company*, 121 F.3d 472 (9th Cir. 1997), Pet. at 12, is factually indistinguishable from *Atkinson* and has no bearing here for the same reasons. Similarly, in *Fantastic Flakes, Inc., v. Pickwick Intern., Inc.*, 661 F.2d 479 (5th Cir. 1981), Pet. at 12, 13, 17 and 21, the choice-of-law provision did not reference any particular state laws, but referred vaguely to "the laws of [a particular state]."

The importance of the contract language is highlighted by the fact that most of the cases cited by Chevy Chase do not turn upon questions of federal preemption or other issues that even arguably justify this Court's review, but are instead simply cases involving questions of contract interpretation. As the Third Circuit stated in *Roadway*: "The issue before us . . . is not one of choice-of-law or preemption – it is simply a matter of contract construction." 257 F.3d at 294. The Court added that it is wrong "to focus on preemption rather than contract construction." *Id.* at 296 n.4. The decision in *Atkinson*, similarly, turned upon the court' s conclusion that "a more reasonable interpretation of the contract is that the choice-of-law provision was intended to govern contract matters not covered by" federal law. *Id.* at 398 (emphasis added).

Second, several cases cited by Petitioner are distinguishable on the ground that a defendant's promise to follow the state law at issue would have conflicted with the goals and operation of federal law. Chevy Chase claims, for example, that the decision below conflicts with *Smith v.*

Comair, Inc., 134 F.3d 254 (4th Cir. 1998). In *Smith*, an airline passenger forgot his drivers' license and was not permitted to board a plane. The passenger then sued the airline for breach of contract, false imprisonment and other claims. The Fourth Circuit noted that "Smith's failure to produce identification implicated the safety concerns of both the [Airline Deregulation Act ("ADA")] and the FAA directive. Because Smith's contract claim is based upon Comair's refusal to permit him to board, it directly implicates the airline's discretion and/or duty under federal law. Accordingly, the contract claim is preempted under the ADA." 134 F.3d at 258. In this case, by contrast, there is no conflict with federal law, as set forth in Part I above.

IV. THE DECISION BELOW IS NOT IN CONFLICT WITH THE OTS's REGULATIONS.

Chevy Chase argues that the decision below conflicts with the regulations of the OTS. In fact, those regulations make clear that there is no basis to sweep away consumer claims of the sort raised by plaintiffs here.

The OTS regulations contain a savings clause that *expressly preserves* state "contract and commercial law" from federal preemption. The regulations governing applicability of state law begin by stating that "OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation," 12 C.F.R. § 560.2(a), except to the extent that a lender chooses to obligate itself by contract. In other words, the "flexibility" that OTS seeks to protect includes the flexibility for a lender to voluntarily promise to follow state laws.

Paragraph (c) of the regulations in turn provides that:

> State laws of the following types *are not preempted* to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:
>
> *(1) Contract and commercial law;* [and] . . .
>
> (6) Any other law that OTS, upon review, finds: (i) Furthers a vital state interest; and (ii) Either has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section.

12 C.F.R. § 560.2(c). As the italicized language makes clear, state contract law is expressly *excluded* from the preemptive scope of HOLA and the OTS regulations except to the extent that such law is otherwise inconsistent with the purposes of 12 C.F.R. § 560.2(a). *See also* 61 Fed. Reg. at 50966 ("OTS wants to make clear that it does not intend to preempt basic state laws such as state uniform commercial codes and state laws governing real property, contracts [or] torts . . . .").

Chevy Chase seeks to evade this Savings Clause with the same gambit it uses to ignore this Court's decision in *Wolens*. Chevy Chase argues that the paragraph (c) Savings Clause for contract causes of action is limited to contractual provisions that mimic state law, rather than incorporate state

law by reference. Pet. at 21. A contractual provision that incorporates state law by reference, according to Chevy Chase, is exempted from this Savings Clause and is preempted.

This odd and formalistic defense finds no support in the language of paragraph (c) itself, however, and no known authority supports it. The evident purpose of the Savings Clause is to permit lenders to craft agreements as they will, but then to allow borrowers to hold lenders to those agreements if they breach them. This applies just as strongly to contractual promises that incorporate obligations by reference as to contractual promises that mimic the obligations through language. Holding parties to their promises, whatever those may be, requires precisely the kind of traditional infrastructure of state law that undergirds commercial consumer transactions and that paragraph (c) is designed to save from preemption. There is an exception for contractual promises that conflict with the purposes of federal law, but this does not apply here, as was established in Part I above.

In keeping with the OTS's own position on the matter, numerous courts have held that neither HOLA nor its implementing regulations preempt common-law contract, tort, and consumer protection claims that do not otherwise conflict with OTS's regulatory scheme. *See, e.g., Flanagan v. Germania, F.A.*, 872 F.2d 231, 234 (8th Cir. 1989) (claim for tortious interference with contract not preempted by HOLA); *Tuxedo Beach Club Corp. v. City Federal Savings Bank*, 749 F. Supp. 635, 648 (D.N.J. 1990) (private right of action under state consumer protection law not preempted by HOLA); *Seigel v. American Savings & Loan Ass'n*, 258 Cal. Rptr. 746, 748-53 (1989) (permitting state-law claims for unfair competition and

breach of contract); *Koynenbelt v. Flagstar Bank,* 617 N.W.2d 706, 712-14 (Mich. App. 2000) (HOLA does not preempt common-law tort and contract claims); *Derenco, Inc. v. Benjamin Franklin Federal Savings & Loan Ass'n*, 577 P.2d 477, 481-88 (Ore.), *cert. denied*, 439 U.S. 1051 (1978) (applying state common-law restitutionary principles to loan-related activities of federal lenders).

Chevy Chase argues that a recent opinion letter from the OTS requires a contrary conclusion. Pet. at 13-14. The choice-of-law provision discussed in that letter makes only a general reference to the law of New York, however, rather than specifically citing to any specific state law or statute. App. 106a. The question posed in the letter is whether this language "establish[es] a contractual agreement," appearing to constitute a recognition that if the language had formed a valid contract that it would not have been preempted. The OCC letter is thus as readily distinguishable as cases cited by Chevy Chase such as *Roadway Packaging*.

V. THIS CASE POSES NO POLICY CONCERNS WORTHY OF THIS COURT'S REVIEW.

Chevy Chase and its *amici* suggest that this Court should grant *certiorari* because state courts seeking to expand the scope and power of state authority will seize upon the decision below to do so. This purported fear is unfounded for two reasons. First, the language of the choice-of-law provision here is quite unusual, so the decision below will not have any impact upon most choice-of-law provisions. Second, Chevy Chase's premise is that it would be a misinterpretation of the contract for any court to read its choice-of-law clause as a

promise to comply with the notice provisions of Subtitle 9. A building block of Chevy Chase's argument is its assertion that it promised to comply with Subtitle 9 for reasons that had nothing to do with the notice requirements included in Subtitle 9. Pet. at 3, n. 1. This assertion is unjustified, and this Court need not exercise its jurisdiction to guard against the possibility that the state courts may eventually agree with that conclusion..

The notion that the choice-of-law provision involved in this case is indicative of choice-of-law provisions generally is belied by key evidence submitted by Chevy Chase's own *amici*. The *Amicus* Brief of the American Bankers Association, et al., dramatically illustrates how uniquely specific the language in Chevy Chase's choice-of-law provision is, and thus how unlikely it is that the decision below will affect the results in many other cases. That brief provides, at 6-7 n. 3, six exemplars of choice of law provisions found in other credit card agreements. Each of those provisions refers generally to the laws of one state or another, and not one of those provisions mentions (much less provides a specific citation to) any particular state statute dealing with the notice to be provided by credit card issuers to their card holders.

Similarly, Chevy Chase's premise that no honest court could read the choice-of-law provision involved here as requiring Chevy Chase to comply with the notice provisions of Subtitle 9 is wrong. This Court should not exercise its jurisdiction to resolve a dispute about how the peculiar contract language at issue here should be interpreted. Since the Petition depends upon the assumption that Chevy Chase is right about this merits issue, however, this Opposition will summarize some of the main reasons why it would be entirely reasonably

(and hardly a power grab by state courts) for the state court to interpret this contract as a promise to comply with Subtitle 9.

First, Chevy Chase itself acknowledges that the choice-of-law provision was intended to incorporate part of Subtitle 9 into its contract – the part of Subtitle 9 that involves interest rates. This admission is inconsistent with and disproves its later claim that such laws could never be incorporated into a cardholder agreement by reference. In essence, Chevy Chase's position amounts to this: "Federal law preempts the conclusion that a lender has agreed to follow any state law referred to in a choice-of-law provision, except for state laws that the lender chooses to follow once a dispute arises."

Second, Chevy Chase's assertions about its intention to incorporate part, but not all, of Subtitle 9 into the contract are contrary to the language of its contract. The actual language of the choice-of-law clause states that Chevy Chase would follow:

> Subtitle 9 of Title 12 of the Commercial Law Article of the Maryland Annotated Code and applicable federal laws. E. 78.

Chevy Chase would like this Court to assume that the only reasonable way for a court to interpret this provision would be to instead pretend that it reads as follows:

> **Those parts of** Subtitle 9 of Title 12 of the Commercial Law Article of the Maryland Annotated Code **that relate to usury, but not other parts of that Subtitle such as the ones that relate to giving adequate notice**

of changes to cardholder agreements, and applicable federal laws.

The decision of the Court below that the trial court might refuse to reach this interpretation is hardly evidence of some power grab by state courts. Chevy Chase was free to have drafted this contract of adhesion as it wished, and it could have written the choice-of-law provision to limit itself to the provisions of Subtitle 9 that relate to interest rates.

Chevy Chase's proposed interpretation of the card holder agreement also ignores the well-established rule of contract interpretation that more specific promises (such as a promise to comply with Subtitle 9) will govern over more general promises (such as a general promise to comply with applicable federal laws). *E.g. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992). Chevy Chase also asks this Court to assume that the contract should be interpreted in favor of the drafting party, an assumption that this Court has rejected on many occasions. *E.g., C & L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001) ("In appropriate cases, this Court applies the common law rule of contract interpretation that a court should construe ambiguous language against the interests of the party that drafted it.") If the state court goes on to apply these doctrines to the plain language of Chevy Chase's choice-of-law provision, that will not be proof of some abuse of power by state courts.

Finally, this Court should not credit the unsupported assertions Chevy Chase offers in the Petition to the effect that it never intended to follow the provisions of Subtitle 9 relating to the notice to be given to card holders. Pet. at 3 n. 1. Chevy

Chase offers no record citation to any evidence supporting its claims of purpose. In fact, Chevy Chase refused to respond to any discovery requests relating to its purposes until after the motion to dismiss was resolved. Having refused to produce any evidence on this issue, it is inappropriate for Chevy Chase to ask this Court to assume that the contract language at issue was intended in a certain way. Even if it were an appropriate use of this Court's jurisdiction to resolve questions of contract interpretation, it should hardly do so based upon bald assertions of one party's intent that are not supported by any record evidence.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for *Certiorari*.

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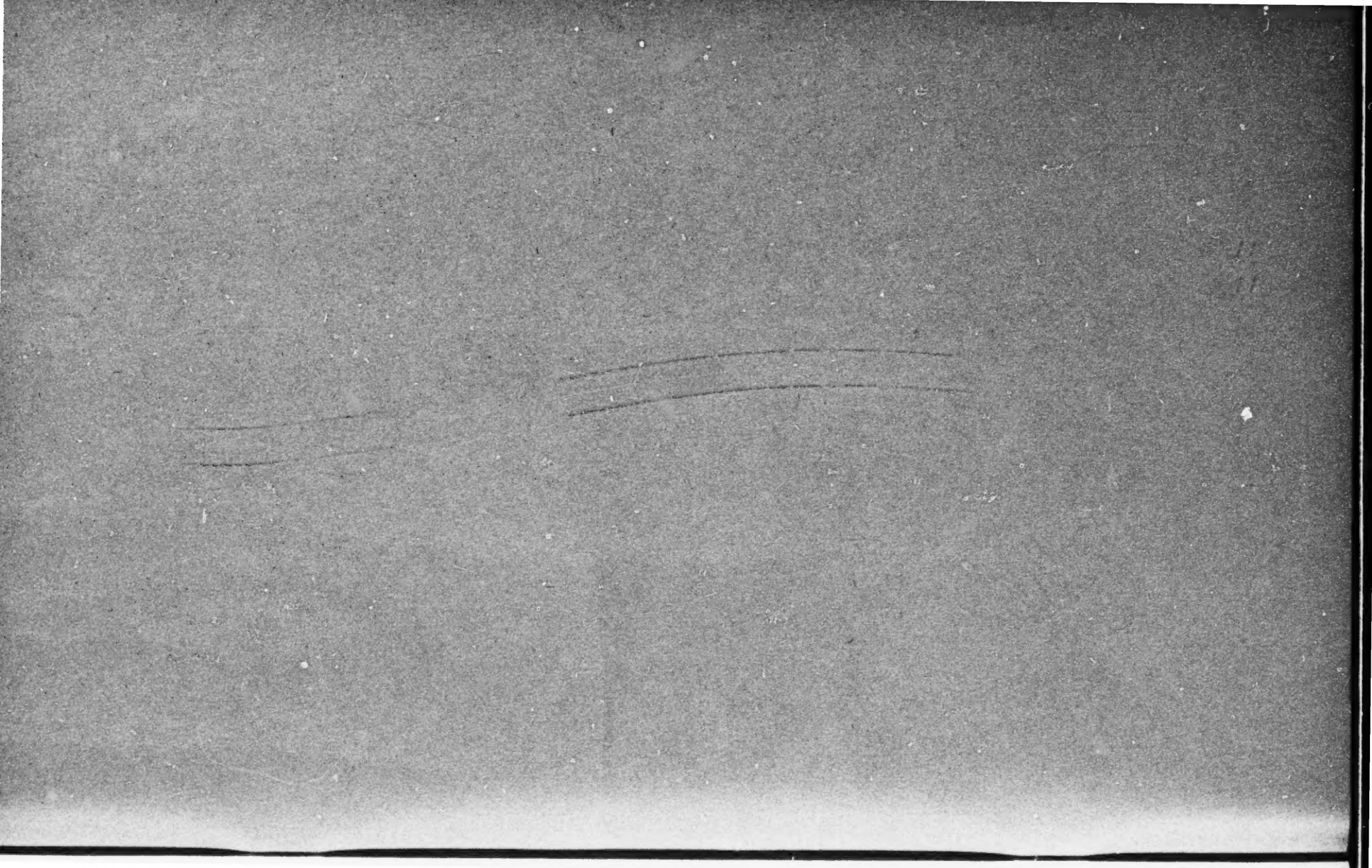

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Supreme Court, U.S.
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No. 03-918

IN THE

Supreme Court of the United States

CHEVY CHASE BANK, F.S.B., ET AL.,
Petitioners,

v.

DALE WELLS, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the Maryland Court of Appeals

REPLY TO BRIEF IN OPPOSITION

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March 17, 2004

CORPORATE DISCLOSURE STATEMENT

Petitioners reiterate the following corporate disclosures pursuant to Supreme Court Rule 29.6:

1. Chevy Chase Bank, F.S.B. states that 80% of its stock is owned by the B.F. Saul Real Estate Investment Trust. No other publicly-held corporation owns 10% or more of its stock.

2. Bank One Delaware, N.A. states that it is a wholly-owned subsidiary of Bank One Corporation.

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INTRODUCTION

Respondents, attempting to justify the decision of the court below and to explain away the clear conflict between that decision and the uniform precedents of this Court and lower federal courts, simply echo the lower court's erroneous reasoning and misunderstanding of the applicable precedents. As we briefly reiterate in Part III below, the decision of the Maryland Court of Appeals violates the well-established rule that a contractual choice-of-law provision that designates the governing *state* law cannot, under the Supremacy Clause, be interpreted as choosing that particular state law over preemptive federal law.

Apparently recognizing that both the holding and rationale of the Maryland Court of Appeals' opinion inherently conflict with this principle, Respondents seek to avoid review on two grounds not related to that conflict. First, they contend that this Court has no jurisdiction because the decision below is not a "final judgment" under 28 U.S.C § 1257. (Brief in Opposition ("Opp.") 8-12.) Second, Respondents assert that the *particular language* of the specific choice-of-law provision in issue here somehow renders it unworthy of review and distinguishes this case from the uniform line of cases holding that such provisions cannot, as a matter of law, be interpreted to subject the defendant to liability for failure to comply with preempted state law. (Opp. at 6-7, 17, 19-21, 26.) Both of these arguments are wrong, as we explain in Parts I and II below.

ARGUMENT

I. THIS COURT HAS JURISDICTION

Although acknowledging that the opinion below is a final decision on the federal question whether preempted state laws can be revived through "interpretation" of choice-of-law provisions, Respondents argue that the judgment below is not "final" under 28 U.S.C. § 1257(a) because the decision did

not entirely dispose of the case. (Opp. 8-12.) As Respondents concede, however, this Court has never interpreted the finality requirement of § 1257 "to preclude review 'where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.'" *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477 (1975) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). Rather, "the Court has recurringly encountered" and granted review in "situations in which the highest court of the State has finally determined the federal issue presented in a particular case, but in which there are further proceedings in the lower state courts to come." *Cox*, 420 U.S. at 477.

The present case comes squarely within the fourth category of exceptions to the finality rule identified in *Cox*:

> [W]here the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . , [and] if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue . . . .

Id. at 482-83. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-80 (1988) (applying exception to review interlocutory state court decision rejecting federal preemption defense); *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984) (same).

Here, the Maryland Court of Appeals has finally decided the federal preemption question, anterior to the state law

issues, and a reversal of that decision would end the case. Conversely, eschewing review of the final federal question, at a minimum, "*might* seriously erode federal policy." *Cox*, 420 U.S. at 483 (emphasis added). For the reasons stated in the Petition, it is clear that permitting state courts to subject federal lenders to otherwise preempted state laws under the guise of contract interpretation would seriously erode, if not destroy, the express policy of the federal Office of Thrift Supervision ("OTS") to occupy the field through comprehensive and *uniform* national regulations so that federal lenders would not be "subject to a hodgepodge of conflicting and overlapping state lending requirements." *Lending & Investment*, 61 Fed. Reg. 50951, 50965 (Sept. 30, 1996). *See also* 12 C.F.R. § 560.2.

For this reason, the fourth *Cox* exception to finality has routinely been applied to preemption issues, because it is the fact of subjecting parties to inconsistent and preempted state law that undermines the federal regulatory scheme. In *Goodyear Atomic Corp.*, for example, the Court applied its "pragmatic approach" to the finality rule to a decision in which the Ohio Supreme Court held that the Supremacy Clause did not bar the application of state workers' compensation laws to a private contractor operating a federally owned nuclear production facility. 486 U.S. at 176, 179. Although the state court had remanded the matter for further administrative proceedings to determine the employee's application for a supplemental compensation award, this Court held that it had jurisdiction to review the preemption question, which had been finally determined by the state court. *Id.* at 179. The Court noted that reversal "would preclude any further proceedings" and that "even if appellant prevails before the [state administrative agency] on nonfederal grounds . . . the unreviewed decision of the Ohio Supreme Court might seriously erode federal policy in the area of nuclear production." *Id.* Accordingly, the Court

determined that it had jurisdiction to review the decision under section 1257. *Id.* at 180, 186.

Similarly, in *Southland*, this Court granted review of a California Supreme Court decision holding that the state's Franchise Investment Law, which precluded arbitration of claims brought under that statute, was not preempted by the Federal Arbitration Act ("FAA"). 465 U.S. at 4-5. This Court pointed out that "to delay the review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court litigation has run its course" would keep in effect a state court decision holding that the state statute did not conflict with the FAA, while reversal of that decision would terminate litigation on the merits. *Id.* at 6-7.

As these cases conclusively demonstrate, Respondents are simply wrong in suggesting that federal policy is eroded only where there is a direct conflict between state and federal law or where the First Amendment is implicated. (Opp. at 11-12.) To the contrary, the state court's interference with a field preemption regulation is the paradigmatic example of a situation where immediate review is needed, because subjecting covered institutions to further state court proceedings challenging actions authorized by preemptive federal law creates the very "obstacle to the accomplishment and execution of the full purposes and objectives" of the preemptive federal law. *Fid. Fed. Savs. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 156 (1982). *See also* 12 C.F.R. § 560.2(a)-(b).

Indeed, Respondents' jurisdictional argument simply assumes the validity of their merits argument that the decision below does not undermine the federal scheme or conflict with this Court's precedent (because that precedent, in Respondents' erroneous view, only reaches *direct* conflict preemption). *Cox* itself cautioned against such putting of the cart before the horse by noting that, for determining whether a decision is sufficiently "final" for jurisdictional purposes, the question is "only" whether there is a "substantial" issue

concerning disruption of the federal scheme and whether the "federal issue" on the merits was "arguably wrongly" decided. 420 U.S. at 486, n.13. The present appeal more than meets those threshold tests.[1]

II. THE LANGUAGE OF THE CHOICE-OF-LAW PROVISION IS IRRELEVANT TO THE QUESTION PRESENTED HERE

Respondents make much of the fact that the choice-of-law provision here refers to "Subtitle 9 of Title 12 of the Commercial Law Article of the Maryland Annotated Code" ("Subtitle 9") instead of "Maryland law."[2] But the particular *form* of the choice-of-law provision – which, in this case, was dictated by the peculiarities of Maryland's dual usury laws (Pet. 3 n. 1) – has no effect on the basic legal question for which review is sought here: whether such contractual choice-of-law provisions may ever be invoked as grounds for

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[1] The sole case cited by Respondents (Opp. at 11) in support of their contention that the fourth *Cox* exception does not apply, *Florida v. Thomas*, 532 U.S. 774 (2001), is inapposite. The state court decision in that criminal case did not finally dispose of the federal constitutional question regarding the search and seizure in issue, and a narrow opinion on one strand of Fourth Amendment law would not affect issues "common to all run-of-the-mine decisions suppressing evidence in criminal trials." *Id.* at 778-80. Here, the federal issue has been finally decided in the state court, and the decision below *is* common to all cases involving "run-of-the-mine" choice-of-law provisions.

[2] The choice-of-law provision also expressly designates "applicable federal laws," a phrase that Respondents studiously ignore. To the extent such minutia is relevant, that language more directly refutes an "election" of preempted state law than did *Fid. Fed. Savs. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), or the subsequent lower federal court decisions, all of which involved choice-of-law provisions that referred only to state law. *See* Pet. 8, 12-14. Thus, the *Fidelity* court and subsequent courts had to *read* preemptive federal law into the contracts under the basic Supremacy Clause principle that state law necessarily incorporates superior federal law. *Fidelity*, 458 U.S. at 157.

imposing preempted state law obligations on activities expressly authorized by dominant federal law.

That issue is squarely presented here because the Maryland Court of Appeals attached *no* significance to the specific language of this choice-of-law provision – as evidenced by the fact that Respondents' *post hoc* "savings" construction of that court's decision is unsupported by a single citation to the opinion. Rather, as the Petition establishes, the court below broadly held that the mere reference in a choice-of-law provision to preempted "'state laws or policies external to the agreement'" may constitute a contractual promise to engage in the activity required by the preempted state law, which is to be decided purely as a "contract interpretation issue . . . , a question of state law." (Pet. App. 39a (quoting *Am. Airlines v. Wolens*, 513 U.S. 219, 233 (1995).) The opinion nowhere suggests that the precise wording of the choice-of-law provision affects this general principle or that a different rule might obtain because the contract references a particular provision of state law that is concededly preempted, rather than all state law, *including* the concededly preempted state law being invoked by plaintiffs. Moreover, the Maryland Court of Appeals found that its decision was consistent with OTS's field preemption regulations because the regulation purportedly exempts all state contract claims, without regard to the particular language of the contractual provisions. (Pet. App. 22a-23a.) Indeed, Respondents themselves, after suggesting that the particular language of this contract is somehow dispositive and distinguishes other cases, advance precisely the broad and erroneous legal principle articulated by the court below, *i.e.*, under *Wolens*, any choice-of-law reference to external state law is equivalent to a contractual commitment to abide by all such state laws (save, perhaps, laws requiring a *violation* of federal law) and the OTS regulation does not preempt any such contractual actions.

Thus, the dispute between Petitioners and both the lower court and Respondents turns on the legal question whether a

choice-of-law provision's mere reference to a preempted regulatory scheme *may* be interpreted as a binding contractual commitment or whether *Fidelity* and the lower court decisions following it preclude state courts from an "interpretation" that replaces a uniform federal scheme with subordinate state law. Respondents offer no reason why this legal question is affected in any way by whether the choice-of-law provision refers to all state law or only to that law relevant to the transaction and which provides the basis for alleging a breach.

Moreover, as the Petition established, one of the principal evils of interpreting choice-of-law provisions to incorporate preempted state laws is that it confronts institutions with a Hobson's choice between either eschewing such beneficial provisions or being deemed to have resurrected state laws inconsistent with federal law. Here, Chevy Chase faced precisely such a Hobson's choice because it was required to specify Subtitle 9 to ensure that the "new" and more flexible state usury laws would apply to the Cardholder Agreement to the extent expressly contemplated by controlling *federal* laws.[3] A standard generic reference to Maryland law would automatically have constituted an election of the "old" rather than "new" usury laws. MD. CODE ANN., COM. LAW § 12-913.1.

Again, however, it is irrelevant *how* a court interprets particular choice-of-law language because *any* reference to external state law cannot, under the Supremacy Clause,

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[3] The "most favored lender" provisions set forth in the OTS field preemption regulations permit federal thrifts like Chevy Chase to charge interest "at the maximum rate permitted to any state-chartered . . . lending institution by the law of that state." 12 U.S.C. § 1463(g); 12 C.F.R. § 560.110(b). Thus, the inclusion of Subtitle 9 in the Governing Law clause effectively designated the 24 percent interest rate limit in § 12-903(a)(1) of Subtitle 9 as the applicable interest rate limit under the Cardholder Agreement, rather than the lower and less flexible interest rates permitted under the "old" Maryland usury law.

somehow provide a basis for a contractual cause of action under that inferior, preempted state law. *See* Pet. 7-11.[4]

III. RESPONDENTS MISCONSTRUE THE APPLICABLE LAW

The Petition explains how the decision below misconstrues and conflicts with the decisions of this Court in *Fidelity* and *Wolens* as well as with the lower federal courts that have applied those cases. (Pet. 7-19.) Respondents have no answer. They share the Maryland Court of Appeals' basic misunderstanding of *Fidelity*, arguing that it involved a direct conflict between state and federal law. *See* Opp. 17-18 and Pet. App. 35a-36a. Petitioners have already explained why this purported distinction is both factually wrong and legally irrelevant. (Pet. 14-16.) Respondents also repeat the lower court's erroneous view of *Wolens*. *See* Opp. 13-17 and Pet. App. 38a-40a. And, like the court below, Respondents misread the "savings clause" of the OTS field preemption regulations, which protects basic state contract and commercial laws, as permitting the imposition of preempted state regulatory provisions by means of a contractual choice-of-law provision. *See* Opp. 22-25 and Pet. App. 22a-24a. OTS itself has rejected that position. (Pet. App. 106a-107a.) Thus, Respondents' assertion that they have a "contract claim" conflicts with the uniform line of federal authorities holding that a choice-of-law provision cannot be read as an express contractual agreement to comply with an otherwise preempted state regulatory law. *See* Pet. 20-21.

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[4] Contrary to Respondents' suggestion, it does not matter whether state courts interpret choice-of-law provisions faithfully or with an eye toward furthering the state's understandable interest in preserving its laws against preemption. The harm to uniform federal regulation occurs when federal lenders are subject to the "hodgepodge of conflicting and overlapping state lending requirements" depending upon their alleged intent reflected in the choice-of-law provision, as interpreted by state courts under state law canons of contract construction.

Respondents also mischaracterize this Court's decision in *Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468 (1989), as supporting their contention that a choice-of-law provision "can obligate a party to comply with otherwise preempted state laws." (Opp. 16-17.) On the contrary, *Volt* held that the FAA did *not* preempt state procedural laws governing arbitration proceedings. 489 U.S. at 475. For that reason alone, the Court did not review the California Supreme Court's interpretation of the choice-of-law provision in that case. *Id.* at 474.

Subsequently, however, this Court did reach the contract interpretation question and held that in view of the federal policy in favor of arbitration, a state choice-of-law provision in an arbitration agreement could not be interpreted to apply state rather than federal procedural law to arbitration proceedings pursuant to the contract. *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 60-62 (1995). *See also Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 294-95 (3d Cir.), *cert. denied*, 534 U.S. 1020 (2001).[5]

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[5] Respondents mischaracterize *Roadway Package*. (Opp. 19-20.) There, the Third Circuit decided, consistent with *Mastrobuono*, that a choice-of-law provision designating Pennsylvania law cannot be read to choose that law rather than federal law for purposes of arbitration proceedings. *Roadway Package*, 257 F. 3d at 289, 294-98. Rather, such an intent could reasonably be inferred only if there were a separate contract provision that specifically expressed that intent, such as a provision stating that the parties intended to arbitrate all claims in accordance with the Pennsylvania Arbitration Act. *Id.* Under that reasoning, the choice-of-law provision here could not be read to obligate Chevy Chase to follow the preempted notice provisions of Subtitle 9, but could be inferred only if the change-in-terms provision of the Cardholder Agreement explicitly stated, "Chevy Chase will give notice of any amendments in accordance with the notice provisions of Subtitle 9." The change-in-terms provision in fact states that Chevy Chase will give notice of amendments in accordance with "applicable law," which, pursuant to OTS regulations, is federal law. *See* 12 C.F.R. § 560.2(b)(9) (preempting state laws purporting to impose notice and disclosure requirements on federally-chartered lenders).

The present case is more compelling, for it involves an express federal preemption and intent to occupy the entire field of lending regulation of federal savings institutions. If a *non-preemptive* federal policy precludes interpretation of a contractual choice-of-law provision to select state instead of federal law, as *Mastrobuono* holds, it necessarily follows that a choice-of-law provision cannot be interpreted to subordinate *preemptive* federal law to preempted state law.

In sum, Respondents provide no reason for this Court to deny review of the decision below. Indeed, their Opposition reaffirms the fundamental incompatibility of the decision below with the clear teaching of *Fidelity* and its progeny, and underscores why this Court's immediate review is needed to prevent further damage to the uniform, national regulatory scheme that OTS has established.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Petitioners,

v.

DALE WELLS, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Maryland Court of Appeals

BRIEF AMICI CURIAE OF AMERICA'S COMMUNITY BANKERS, CONNECTICUT BANKERS ASSOCIATION, MARYLAND BANKERS ASSOCIATION, NEW JERSEY LEAGUE OF COMMUNITY BANKERS AND NORTH CAROLINA BANKERS ASSOCIATION IN SUPPORT OF THE PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE

Amicus America's Community Bankers is a national trade association representing the nation's community banks. ACB members, whose aggregate assets total more than $1 trillion, pursue entrepreneurial and service-oriented strategies in providing financial services to their customers and communities.[1]

Amicus Connecticut Bankers Association is an industry association representing over eighty banks that conduct banking operations in the State of Connecticut.

Amicus Maryland Bankers Association was formed in 1896 and has over 120 members, including the majority of Maryland and federally chartered commercial banks and federally chartered savings banks in Maryland. Its members provide a variety of financial services, including all types of lending, to consumers and businesses in Maryland.

Amicus New Jersey League of Community Bankers is a trade association that has represented New Jersey's savings and community bankers for more than 95 years. It is dedicated to promoting housing, finance and other financial services its members provide.

Amicus North Carolina Bankers Association is a trade association that provides North Carolina financial institutions with legislative liaison, educational and training

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[1] The parties have consented to the filing of this amicus brief. Pursuant to Supreme Court Rule 37.6, amici state that this brief was not authored or funded by any person or entity other than amici or their counsel.

programs, media relations, insurance benefits programs, and regulatory and compliance assistance.

The federal savings association members of each amicus institution are adversely affected by the decision of the Maryland Court of Appeals to read preempted state law into a loan agreement through a general choice of law clause.

SUMMARY OF ARGUMENT

This case presents a legal question of great significance for the nation's federally chartered savings associations -- whether their lending activities will be governed by uniform principles of federal law, as intended by Congress in enacting the Home Owners' Loan Act, and by the Office of Thrift Supervision ("OTS") when it issued an implementing rule that occupied the field of lending regulation; or by a patchwork of overlapping and inconsistent state laws, through a back door mechanism created by the court below that would allow preempted provisions of state law to be read into lending contracts through judicial construction of a choice of law clause.

The Maryland Court of Appeals has held that a choice of law clause in a lending agreement of a federal savings association, which referred generally to state laws that had been preempted by a federal regulation, might nonetheless constitute a voluntary commitment by the lender to comply with those laws. In reaching this conclusion, the Court of Appeals gave no regard to the strong federal interest that pervades regulation of lending by these institutions. Rather, it remanded the matter to the trial court for a determination whether, under ordinary common law principles governing interpretation of contracts, this choice

of law clause constituted an agreement by the federal savings association that it would be bound by the otherwise preempted state laws.

The decision below conflicts with *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982), concerning the preemption of state laws by federal lending rules adopted pursuant to 12 U.S.C. § 1464(a).

The decision below presents significant operational and financial risks for federal savings associations. It threatens to destroy the preemptive effect of the OTS rule and to subject federal savings associations operating on an interstate basis to the divergent and conflicting lending laws of every state in which they do business. Congress, in adopting the Home Owners' Loan Act, 12 U.S.C. § 1462 et seq. ("HOLA"), and OTS, in adopting implementing rules, have long followed the principle that federal preemption of state lending laws is crucial to the safety and soundness of federal savings associations and to their ability to operate under a uniform set of best practices, thereby allowing them to deliver lending services to customers on an efficient, low-cost basis.

There is a substantial risk that, unless the decision below is reversed, the approach devised in this case will be adopted in other jurisdictions and that "interpretation" of choice of law clauses, which are ubiquitous, will become an accepted mechanism by which courts in other jurisdictions may read back into lending agreements of federal savings associations state laws that OTS has explicitly preempted.

By its logic, the decision below affects all forms of lending by federal savings associations, including credit

card, consumer, commercial, automobile and real estate lending, since virtually all lending agreements contain a choice of law clause. In all likelihood, the decision below also will affect other types of federally chartered financial institutions, such as national banks regulated by the Comptroller of the Currency, which also operate under federal rules that are intended to have broad preemptive effect on state laws regulating their lending.

In light of the substantial risks this decision presents to federally chartered financial institutions, the Court should grant the Petition at this time, prior to remand and without awaiting a decision of the trial court whether this particular choice of law clause incorporates Maryland's consumer protection laws into this credit card lending agreement. First, both in its analysis of the choice of law clause and its remand instructions to the trial court, the Maryland Court of Appeals ignored the regard that must be given the important federal interest involved in this area. Accordingly, the trial court's construction of the choice of law clause may be fatally compromised from the outset.

Second, there is an ongoing struggle between federal agencies and the states over whose rules should govern lending by federally chartered institutions operating in that state. If the decision below is not reviewed and reversed at this stage, there is a substantial risk that the mechanism created by the decision below will be adopted by other states and will undermine the uniformity of federal law governing the lending decisions of federal savings associations.

Accordingly, the Court should grant the Petition at this time and resolve the conflict between governing federal law and the decision of the Maryland Court of Appeals.

ARGUMENT

I. THE DECISION BELOW WILL HAVE SUBSTANTIAL ADVERSE EFFECTS ON FEDERAL SAVINGS ASSOCIATIONS AND WILL FRUSTRATE THE OPERATION OF THE UNIFORM NATIONAL LENDING RULES PROMULGATED BY OTS.

The decision of the Maryland Court of Appeals threatens great harm to Chevy Chase and other federal savings associations chartered by OTS under the HOLA.

Federal savings associations, with aggregate total assets of approximately $1.10 trillion, operate in all 50 states and lend to millions of consumers and small businesses. Federal savings associations offer a broad array of financial services to customers, including consumer, commercial and small business, automobile and real estate loans, as well as the credit card loans involved in this litigation. For example, in the area of housing finance, OTS-chartered institutions originated approximately 22% of all 1-4 family mortgage loans, according to the OTS' most recent data.

Federal savings associations, by Congressional design, are able to offer lending services to consumers efficiently and at lower cost than many other financial institutions, due to the nature of the unique federal charter under which they operate. Federal law is the exclusive source of the powers and authorities of these associations. Pursuant to longstanding Congressional policy, OTS seeks to assist consumers by providing federal savings associations with a charter that allows them to operate on an interstate

basis under a uniform set of rules, rather than under a patchwork of 50 separate legal regimes. In this manner, OTS carries out the goals of the HOLA, to facilitate the safe and sound operation of federal savings associations and to enable them to conduct their operations in accordance with the best lending practices in the United States.

Statutory Background. Section 5(a) of the HOLA, 12 U.S.C. § 1464(a) provides "for the organization, incorporation, examination, operation and regulation" of federal savings associations and for the issuance of "charters therefor, giving primary consideration of the best practices of thrift institutions in the United States."

In *Fidelity*, this Court held that state laws may be preempted by federal regulations issued pursuant to Section 1464(a), as long as the intent of the regulatory agency is clear. 458 U.S. at 153-154. Because lending "lies at the heart of the business of a federal thrift savings association, OTS and its predecessor the [Federal Home Loan Bank Board] have long taken the position that federal lending laws and regulations occupy the entire field of lending regulation for federal savings associations, leaving no room for state regulation." Final Rule: Lending and Investing, 61 Fed. Reg. 50951, 50965 (Sept. 30, 1996)(emphasis added).

In September 1996, OTS promulgated a final rule governing the lending activities of federal savings associations. One provision of that rule, 12 C.F.R. § 560.2(a), expressly provided for preemption of all state laws governing the extension of credit by federal savings associations, whether in the form of statutes, regulations or judicial decisions:

> To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities.

In the Preamble to this rule, OTS further explained that as a result of its occupation of the entire field of lending regulation for federal savings associations:

> [I]nstead of being subject to a hodgepodge of conflicting and overlapping state lending requirements, federal thrifts are free to originate loans under a single set of uniform federal laws and regulations. This furthers both the "best practices" and safety and soundness objectives of the HOLA by enabling federal thrifts to deliver low-cost credit to the public free from undue regulatory duplication and burden.

61 Fed. Reg. at 50965.

Efforts of States to Apply Their Laws to Federal Savings Associations. Markets for credits, deposits and

other financial products increasingly have an interstate or national dimension, and technological innovations have reduced the transaction costs and time required to make financial decisions. Federal savings associations have been able to keep pace with these developments through a charter that provides uniform national standards for lending decisions, regardless of where a customer is located.

Applying potentially inconsistent and conflicting state laws to federal savings associations would limit their ability to operate under uniform lending standards. At a minimum, application of inconsistent state laws would prevent federal savings associations from planning and operating their businesses, and managing their exposures, in a manner that diversifies risks and is in accordance with industry best practices.

Further, subjecting the lending decisions of federal savings associations to multiple overlapping and inconsistent state laws would raise transaction costs, create uncertainty about the conditions under which they can do business, and expose them to the costly litigation to determine which legal principles govern their obligations to geographically segmented groups of customers. For these reasons, in Section 1464(a), Congress gave OTS, and not the states, responsibility to determine the "best practices" for federal savings associations and to create nationally uniform rules.

In recent years, however, there has been a vigorous policy dispute over the substantive contents of federal financial institution charters, the powers such entities should have, and how the federal charter should operate compared to state-chartered institutions in the nation's "dual banking system." As part of this debate, there have been repeated

efforts by state and local governments to apply their laws to lending activities of federally chartered financial institutions that that operate within their borders. Prior efforts by the states, at earlier times in our history, to regulate the activities of federally chartered institutions constitute an important part of this Court's Supremacy Clause jurisprudence. *See, e.g., Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25, 31-33 (1996)(summarizing cases that rejected efforts by states to restrict federally chartered financial institutions from exercising powers authorized by Congress); *McCulloch v. Maryland*, 17 U.S. 316 (1819) (application of state taxing authority to federally chartered bank).

For its part, OTS has promulgated rules that it believes will, together with "the elaborate network of federal borrower-protection statutes applicable to federal thrifts", will protect consumers on a "best practices" basis. 61 Fed. Reg. at 50965. State governments, however, have shown a preference for their local consumer protection measures and have been aggressive in seeking to develop mechanisms by which their laws might apply to federally chartered institutions, despite the broad preemptive effects of the federal law. These efforts have led to substantial litigation against federal savings associations. Defense of these cases has imposed significant transactions costs on these institutions.

Until the decision below, courts had consistently ruled that the scope of OTS regulation over federal savings associations is "so pervasive as to leave no room for state regulatory control." *E.g., Conference of Fed. Sav. & Loan Ass'ns v. Stein,* 604 F.2d 1256, 1260 (9th Cir. 1979), *aff'd* 445 U.S. 921 (1980). For example, in a recent decision involving the applicability of a California statute requiring

specific credit card minimum payment disclosures, the district court found that the HOLA and OTS regulations "holistically preempt" the state law. *American Bankers Ass'n v. Lockyer*, 239 F.Supp.2d 1000, 1020 (E.D. Cal. 2002).

Threats Presented by the Mechanism Devised by the Maryland Court. The Maryland Court of Appeals held that the direct application of Subtitle 9 of Title 12 of the Maryland Annotated Code to a federal savings association was preempted by operation of the OTS lending rule. The Court found that Subtitle 9 provided explicit directives for the regulation of revolving credit loans in the state.

> Because [these provisions] impact how credit grantors may operate and conduct their lending activities, which is inconsistent with OTS's expressed intention to "occupy the entire field of lending regulation for federal savings associations," any attempt to enforce these provisions as a matter of State law . . . must fail.

Wells v. Chevy Chase Bank, 377 Md. 197, 215 (Md. 2003).

The Court of Appeals nonetheless held that plaintiff's nearly identical breach of contract claim was not preempted, on the theory that the bank might have voluntarily agreed to comply with the requirements of Subtitle 9 by operation of the choice of law clause of the lending agreement. *Id.* at 224-225. The choice of law clause did not set forth any specific obligation to which the bank committed. Rather, it contained a general statement that defined the governing law for the contract as Subtitle 9 and applicable federal laws. Nonetheless, the Court of Appeals reversed the trial court's

ruling and remanded the matter for a determination whether, under the common law contract interpretation principles that govern in Maryland, this general choice of law clause had the effect of incorporating into the contract otherwise preempted provisions of Maryland law. *Id.* at 231-232.

This misuse of the choice of law clause by the Maryland Court of Appeals threatens to subject federal savings associations to the "hodgepodge of conflicting and overlapping state lending requirements" that OTS sought to avoid when it occupied the field of lending operations and authorized federal savings associations "to originate loans under a single set of uniform federal laws and regulations." 61 Fed. Reg. at 50965.

Choice of law clauses are found in virtually all lending contracts of federal savings associations, not just for credit card loans but also in agreements governing consumer, commercial, automobile and real estate loans. Inclusion of such a "horizontal" choice of law provision in a lending agreement is efficiency-enhancing for both lenders and borrowers. Such a clause identifies which state's background law will apply in the areas that OTS has not preempted and thus eliminates the credit risk and the expense and uncertainty of litigation over this issue.

The decision below threatens federal savings associations with substantial harm, by creating a back door mechanism through which preempted provisions of a state's law can be read back into a lending agreement, thereby defeating the preemptive effect of Section 560.2(a). OTS adopted this rule to facilitate the sound operation of federal savings associations and to enable them to conduct their operations in accordance with the best practices of

comparable institutions nationwide. The Court of Appeals' decision threatens the accomplishment of OTS's purposes.

First, although its effects are nominally confined to Maryland, the decision below threatens to have substantial consequences in all 50 States. Given the persistent efforts by the states to regulate institutions operating under a federal charter despite preemptive federal rules, it is highly likely that plaintiffs or state regulatory officials in other states will seize upon this mechanism and make similar arguments to courts in other jurisdictions that general choice of law clauses should be interpreted to read preempted state laws back into lending agreements.

Second, by its own logic, the decision below would apply to all types of lending services that federal savings associations offer, and not just the credit card loan plan at issue in this lawsuit. Since federal savings associations include choice of law clauses in agreements for virtually all their consumer, commercial and real estate loans, the decision below could have adverse effects on lending activities of federal savings associations in other areas as well.

Third, the decision below threatens to harm the operations of other federally chartered financial institutions, such as national banks, that operate pursuant to statutory and regulatory provisions that are intended to create a uniform national charter and broadly preempt state laws that would interfere with the accomplishment of the federal purpose.

II. THE DECISION OF THE MARYLAND COURT OF APPEALS IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

The Maryland Court of Appeals found that Subtitle 9 was preempted by the OTS rule and that this restrictive state law could not be applied directly to the credit card lending agreement at issue. *Wells*, 377 Md. at 214-215. The Court of Appeals found, however, that under *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), the same provisions might be independently enforceable if the bank had voluntarily agreed in its lending agreement to be bound by those provisions. *Wells*, 377 Md. at 217-224.

The Court then pointed to the choice of law provision, which defined the governing law as "Subtitle 9 of Title 12 of the Commercial Law Article of the Maryland Annotated Code and applicable federal laws." (Pet. App. 47a). Without giving any regard to the federal interest that permeates the area of lending by federal savings association, the court interpreted this choice of law clause as creating an ambiguity whether the bank had voluntarily agreed to be bound by Subtitle 9.

The Court reversed the dismissal of the contract claim and remanded the matter to the trial court, to resolve this ambiguity and determine whether, under ordinary state canons of construction applicable to private contracts in areas not governed by a pervasive federal interest, the choice of law clause had the effect of incorporating the provisions of Subtitle 9 into the agreement.

The decision of the Maryland Court of Appeals is incorrect as a matter of law.

A. The Decision Below Conflicts with *Fidelity*.

The decision below is inconsistent with this Court's holding in *Fidelity Federal Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982). There, OTS's predecessor (the Federal Home Loan Bank Board) promulgated a regulation under 12 U.S.C. § 1464(a) that gave federal savings associations the right to include a due-on-sale clause in their home loan agreements. In the Preamble to that rule, the agency stated its intent that federal savings associations would not be bound by any state law that imposed different due-on-sale requirements. *Id.* at 147.

On appeal, this Court found that "[t]he broad language of [Section 1464(a)] expresses no limits on the [agency's] authority to regulate the lending practices of federal savings and loans" and that "the statutory language suggests that Congress expressly contemplated, and approved, the Board's promulgation of regulations superseding state law." *Id.* at 161-162. The Court also found that "Congress plainly envisioned that federal savings and loans would be governed by what the [agency] – not any particular state – deemed to be the "best practices." *Id.* at 161. The Court therefore held that the agency rule preempted an inconsistent California law restricting exercise of due-on-sale provisions.

In reaching this conclusion, the Court explicitly rejected an argument for application of state law based on a choice of law clause that had the same effects as the clause involved in this case. Two of the three deeds of trust at issue in *Fidelity* contained a provision which stated that the deed was to be governed by the "law of the jurisdiction" in which

the property was located. The plaintiffs argued that through this language, the lender voluntarily incorporated California contract law into the agreement, including its law restricting the exercise of a due-on-sale clause. The Court rejected this argument, however, on the ground that "the law of the jurisdiction" in which the property is located includes federal law as well as state law. 458 U.S. at 157 & n. 12.

> [T]he incorporation of state law does not signify the inapplicability of federal law, for "a fundamental principle in our system of complex national policy" mandates that "the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution."

458 U.S. at 157 (quoting *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880)).

Under the choice of law clause branch of *Fidelity*, the Maryland Court of Appeals erred in ruling that the mere reference to Subtitle 9 in the choice of law clause could have the effect of incorporating by reference this body of state law into the lending agreement. Here, the choice of law clause explicitly states that the agreement will be governed by federal law, as well as by Subtitle 9. The OTS rule that occupies the field of lending regulation for federal savings associations is one of the "applicable federal laws" that was incorporated into the agreement. Thus, as in *Fidelity*, the express incorporation of federal law into the agreement, through the choice of law clause, means that the state law is preempted.

This conclusion is consistent with OTS' interpretation of its lending rule. On October 6, 2003, the agency issued an

opinion letter concerning a choice of law provision in a loan document issued by a federal savings association, which invoked both federal law and the law of the place where the property is located (New York). OTS stated that the reference in the agreement to state law did not establish a contractual agreement to pay interest on escrow accounts as if the provisions of New York law were not preempted.

> The reference to federal law and state law in the same provision of the mortgage document includes the preemptive effect of federal law. In other words, Federal law continues to operate so as to preempt an impermissible state requirement. The reference to state law does not nullify or negate the preemptive effect of federal law.

OTS Opinion Letter P-2003-7 (Pet. App. 101a-108a).

B. In its Interpretation of the Lending Agreement, The Maryland Court of Appeals Erred by Ignoring the Critical Role of the Preemptive Federal Rule.

The Maryland Court of Appeals also erred by ignoring the principle that in construing a choice of law clause in an area that is governed by a dominant federal concern, the contract must be interpreted in a manner that gives proper regard to the federal interests at stake.

In determining that Subtitle 9 was preempted, the Court of Appeals correctly identified the predominant federal interest in governing lending by federal savings associations. However, it completely ignored this consideration in addressing the parallel breach of contract claim. On that

issue, in considering whether the choice of law clause introduced an ambiguity into the agreement, the Court of Appeals did not consider or give any weight whatsoever to the federal interest.

Further, the court below did not consider the federal interest in shaping its remand instructions. It simply stated that "[c]ontract interpretation, unlike the issue of federal preemption, is a matter of state law", 377 Md. at 224 & n.12, and that the issue "will require application of the familiar canons of construction" followed by Maryland law in reviewing private contracts, *id.* at 232.

In making these two determinations, the Court of Appeals erred by failing to give consideration to the federal interest. The governing rule is that when a court is called upon to interpret the choice of law clause in an agreement affecting an area in which there is a strong federal policy interest, due regard must be given to the federal policy; and any ambiguities as to the scope of the choice of law clause must be resolved in favor of the federal interest. This conclusion is set forth explicitly in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989), on which the court below relied (*Wells*, 377 Md. at 221, 224).

Volt involved a choice of law clause in the context of the Federal Arbitration Act -- a statute that (unlike the OTS rule) did not fully preempt state laws governing arbitrations. The Court there concluded that in interpreting the effect of a choice of law clause, "due regard must be given to the federal policy" involved. *Volt*, 489 U.S. at 476.

This principle is confirmed in *Mastrobuono v. Shearson, Lehman Hutton, Inc.*, 514 U.S. 52, 61 (1995), another case arising in the arbitration context. There, the Court held that an ambiguous choice of law clause does not incorporate state law into a private contract in an area of federal interest, because ambiguities must be resolved in favor of the federal policy. *See also Roadway Package Sys. Inc. v. Kayser*, 257 F.3d 287, 294-295 (3rd Cir.), *cert. denied*, 534 U.S. 1020 (2001).

The Court of Appeals completely ignored the *Volt* principle, even though dealing with a contract involving a "uniquely federalized financial institution[]" (61 Fed. Reg. at 50965), whose operations are regulated by a completely preemptive OTS lending rule designed to protect its safety and soundness and to assure that it follows what OTS – "not any particular state – deemed to be the best practices . . . " (*Fidelity*, 458 U.S. at 153-154). Under *Volt*, any alleged "ambiguity" in the choice of law clause should have been resolved in favor of the federal interest.

C. ***Wolens*** **Does Not Support the Decision Below.**

The Court of Appeals asserted that its decision was justified by *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). That decision restated the preexisting principle that the courts may enforce a voluntary agreement by a party to be bound by certain contract provisions, even though a state would be preempted by federal law from imposing the same requirements on that party. However, *Wolens* does not justify the decision below.

Wolens did not involve a choice of law clause. The Court did not purport to consider whether state law could be

deemed to be incorporated wholesale into a contract through such a mechanism. To the contrary, the alleged obligations of the airline were affirmatively set forth in a clause in the contract. *Wolens* simply held that the federal statute at issue did not preclude state-law-based adjudication of a breach of contract claim, in which the meaning of a clause making an affirmative commitment would be determined by application of state contract interpretation principles.

III. REVIEW SHOULD BE GRANTED AT THIS TIME TO PREVENT THE SPREAD TO OTHER JURISDICTIONS OF THE MECHANISM TO AVOID FEDERAL LAW CREATED BY THE COURT BELOW.

It is important that the Court grant the Petition at this time, prior to remand and without awaiting a decision of the trial court whether, under common law principles of contract interpretation, this particular choice of law clause incorporates Maryland's consumer protection laws into this credit card lending agreement. If the decision below is not reviewed and reversed at this stage of the case, federal savings associations will suffer substantial and immediate harm.

First, the decision threatens to stimulate a wave of litigation in the courts of the 50 states, in which private plaintiffs and state attorneys general may seek to have preempted state laws read back into the contracts of federal savings associations through the choice of law clause mechanism devised in this case. If use of this mechanism is permitted to spread, federal savings associations may be required to defend against copycat breach of contract claims.

The risks and transaction costs of defending these lawsuits will deprive these associations of one of the important benefits of the uniform, defined rules that OTS sought to achieve by occupying the field.

Second, if the mechanism created below is allowed to flourish, then the de facto rules actually governing lending by a federal savings association will be determined, not by an OTS rule of general applicability, but by the results of case-by-case adjudications in various states under common law principles of contract interpretation. There is a substantial risk that the decisions in these state court cases would create the hodgepodge of inconsistent rules that OTS sought to avoid. Further, as a practical matter, these state court decisions may be largely impervious to federal judicial review, so that the possibility of appellate consideration at a later stage may not provide an adequate means for vindicating the uniformity of lending rules that OTS intended to create.

CONCLUSION

Amici submit that the Petition for a Writ of Certiorari should be granted.

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BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Where the federal government has occupied the field, can a state court interpret a standard contractual choice-of-law provision to impose otherwise preempted state law on the contracting parties?

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69 Fed. Reg. 1908 (Jan. 13, 2004).....8

69 Fed. Reg. 1908 (Jan. 13, 2004).....8

69 Fed. Reg. 1911 (Jan. 13, 2004).....10

69 Fed. Reg. 1916 (Jan. 13, 2004).....10

ADMINISTRATIVE MATERIAL:

OTS Legal Op. P-2003-1 (January 21,2003).....8

IN THE
SUPREME COURT OF THE UNITED STATES

No. 03-918

CHEVY CHASE BANK, F.S.B., ET AL.,

Petitioners,

v.

DAVID WELLS, ET AL.,

Respondents.

On Petition for Writ of Certiorari
to the Maryland Court of Appeals

BRIEF OF THE AMICI CURIAE[1] AMERICAN BANKERS ASSOCIATION AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF THE PETITIONERS

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[1] Pursuant to Rule 37.6 of this Court, amici curiae state that no counsel for a party has written this brief in whole or in part and that no person or entity other than the amici curiae, their members or their counsel has made a monetary contribution to the preparation or submission of this brief.

With the written consent of the parties, originals of which have been filed with the Clerk, the American Bankers Association and Consumer Bankers Association hereby respectfully submit this brief as amici curiae to urge that the Petition for Writ of Certiorari in the above-entitled case be granted.

INTEREST OF THE AMICI CURIAE

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. Its members are located in each of the fifty states and the District of Columbia and include banks of all types and sizes, including money-center, regional and community banks, national and state chartered banks, commercial banks, savings banks and savings and loan associations, independent and holding company owned banks. ABA members hold approximately 90% of the domestic assets of the industry.

Consumer Bankers Association ("CBA") was founded in 1919 and has as its members most of the nation's largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the banking industry's assets. CBA members are leaders in consumer financial services including auto finance, home equity lending, credit cards, educational loans, small business services, community development, investments, deposits and delivery.

Both associations frequently appear in litigation, either as a party or as amicus curiae, where the issues raised are of widespread importance to the industry at large or to the consumers of banking products and services. As a matter of policy, both associations have historically

supported the continued existence and strengthening of the dual banking system whereby individual institutions have the choice between chartering and regulation by the government of the United States and chartering and regulation by the state in which the institution is located. The creative tension between the two sets of chartering authorities has been an engine of immense growth in the capacity of the industry to serve the American consumer with an increasing array of products and services.

Critical to the success of the dual banking system is the correct understanding and application of the principles of federal preemption in the banking context. Federal primacy over the activities of federally-chartered institutions prevents individual states from significantly interfering in the initiatives of such institutions that have either the explicit or tacit approval of the federal authorities. States, being naturally jealous of their own prerogatives, tend to expect compliance with their own laws by all entities doing business in the state or with the state's citizens, whether those entities are federally-chartered or state-chartered and without regard for any federal interests extraneous to the state. Here, Maryland has its own disclosure statute setting forth a method by which financial institutions must notify customers of prospective changes in their contracts. The statute was no doubt adopted by the General Assembly for good and valid reasons. The Maryland Court of Appeals seemed determined to advance those public policy reasons, even in the face of its own admission that the state law was preempted, by sanctioning a back-door method of accomplishing that which could not be accomplished directly.

As we show below, the reasoning of the Maryland court, if allowed to stand and if followed elsewhere, can

have immense ramifications for the banking industry at large, well beyond the interests of the immediate parties to this case. We respectfully submit that your amici, as national associations for the industry, may be equipped to assist the Court in gauging the importance of the issues presented here.

STATEMENT OF THE CASE

At the time it entered into a credit card agreement with the Respondents in this case, Chevy Chase Bank, F.S.B. ("Chevy Chase") was headquartered in the State of Maryland. The credit card agreement contained, among other things, three provisions that are relevant to the discussion here. (1) It reserved to Chevy Chase the right to alter the terms of the agreement at any time so long as the change was "in accordance with applicable law." (App. 46a). (2) It recited that the agreement was made in Maryland, and that the governing law would be Title 12, Subtitle 9, of the Commercial Law Article of the Maryland Annotated Code and applicable federal law (App. 47a). (3) It set out the various financial terms and conditions of the contract pertaining to interest rates, late fees, over-limit fees and so forth.

Eight years ago this month, Chevy Chase relocated to Virginia. Concurrent with that move, the bank invoked its right to amend the agreement. It notified its customers, including the respondents, that (1) the agreement was made in Virginia and was subject to and governed by Virginia law and applicable federal law and regulations, and (2) various of the financial terms dealing with finance charges and other fees were changed as well (App. 4a-5a).[2] The

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[2] A third change of which the respondents were notified after the move to Virginia was the addition of a clause calling for

notice sent to customers announcing these changes complied in all respects with the bank's obligations under the federal Truth in Lending Act and the Respondents do not contend otherwise. The Respondents contended, however, that the notice did not comply with the requirements of Maryland law, specifically Title 12, Subtitle 9 of the Commercial Law Article. Finding that law preempted, the Circuit Court for Baltimore City dismissed the complaint (App. 51a-52a), but the Maryland Court of Appeals reversed in the decision that is now subject of the Petition for Writ of certiorari in this case.

ARGUMENT

The Petition for Writ of Certiorari filed in the case has already set forth the argument that the decision of the Maryland Court of Appeals is at odds with this Court's decision in *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141 (1982), and is in conflict with the decisions of other appellate courts as well, including among others *Fantastic Fakes, Inc. v. Pickwick International, Inc.*, 661 F.2d 479 (5th Cir. 1981), *Brown v. Investors Mortgage Corp.*, 121 F.3d 472 (9th Cir. 1997) and *Atkinson v. General Electric Credit Corp.*, 866 F.2d 396 (11th Cir.), *cert. denied,* 493 U.S. 815 (1989). Your amici adopt and defer to those arguments as presented by the Petitioners. No point would be served by our repetition of them.

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resolution of disputes between the parties by mediation and arbitration. That change was also subject to litigation between these parties (*see Wells v. Chevy Chase Bank, F.S.B.*, 363 Md. 232, 768 A. 2d 620 (Md. 2001)) but is not before this Court.

The amici respectfully submit, however, that the Petition should also be granted because of the considerable impact that the decision below could have upon federal-state relations in the area of banking law, a topic already too much litigated, and upon the clarity, predictability and uniformity of rules under which banks and their customers should be able to operate. Unless reviewed and overturned by this Court, the Maryland Court of Appeals' decision is both likely to be utilized by parties (states' attorneys general, consumer activists, class action counsel, etc.) in other states and likely to be relied upon by other states' highest courts to upset and countermand the preemption of federal law established by federal banking regulators with respect to the lending activities of federal charted banking institutions. All of the very largest credit card issuers have "choice of law" provisions in the contracts they have with their customers. There are variations in the phrasing of the provisions[3] but, if the Maryland Court of Appeals is right,

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[3] Exemplars include the following:

a) "This Agreement and your Account will be governed by federal law and the laws of the state of Nevada, whether or not you live in Nevada and whether or not your Account is used outside Nevada. This Agreement is entered into in Nevada and all credit under this Agreement will be extended from Nevada."

b) "This Agreement and your Account and any claim, dispute or controversy arising from or relating to this Agreement or your Account, whether based on contract, tort, fraud or other intentional torts, statute, common law and/or equity, are governed by and construed in accordance with the laws of the State of Georgia

all are susceptible to the interpretation that the choice of law provision incorporates back into the contract assorted

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will be governed by the laws of the state of(without regard to internal principles of conflicts of laws), and applicable federal law. The legality, enforceability and interpretation of this agreement and the amounts contracted for, charged and received under this Agreement will be governed by such laws. This Agreement is entered into between you and us in Georgia. We make decisions about granting credit to you under this agreement from, and accept your payments in, Georgia."

c) "This agreement Delaware and by applicable federal laws."

d) " The terms and enforcement of this Agreement shall be governed by federal law and the law of South Dakota, where we are located."

e) "This Agreement and your Account, and all questions about their legality, enforceability and interpretation, are governed by the laws of the State of Utah (without regard to internal principles of conflicts of law), and by applicable federal law. We are located in Utah, hold your Account in Utah, and entered into this Agreement with you in Utah."

f) "This Agreement is governed by the laws of the United States of America (federal law) and the State of Delaware. Any dispute concerning any item in this Agreement will be resolved by those laws."

and unanticipated state laws that would otherwise be preempted. A bank that today uses the language in footnote 3, for example, that selects Georgia law (including statute law) could hardly intend to bind itself by the provisions of the Georgia Fair Lending Act (Ga. Code Ann. § 7-6A-1 et seq.), a statute that imposes such onerous restrictions and penalties on certain classes of loans that the secondary market briefly refused to purchase any mortgages originated in that State,[4] and a statute that has been pronounced preempted by federal law as to federally-chartered thrift institutions by the Office of Thrift Supervision (OTS Legal Op. P-2003-1 (January 21, 2003)) and as to national banks and their operating subsidiaries by the Comptroller of the Currency (68 Fed. Reg. 46264 (August 5, 2003)). And yet that would be the inevitable interpretation of the boilerplate "choice of law" provision under the reasoning of the Maryland Court of Appeals.

Choice of law provisions are necessary and useful in any contract that involves or may involve transactions across state lines, and particularly in the case of banking contracts. First of all, various provisions of federal banking law incorporate state law, so it is important for the parties to a contract to know and to recite which state it is whose law is applicable to a given transaction. For example, 12 U.S.C. § 85 authorizes national banks to charge "interest at the rate allowed by the laws of the State, Territory, or District where the bank is located." *See also*, 12 U.S.C. § 1463(g). Similarly, 12 U.S.C. § 1831d extends the same authorization to federally-insured state-chartered institutions. National banks are allowed to operate new branches wherever in a State a State bank would be authorized to operate a branch by state statute

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[4] *See* 69 Fed. Reg. 1908, col. 2 (Jan. 13, 2004)

pursuant to 12 U.S.C. § 36(c). The trust powers that may be exercised by national banks are made equivalent to those of State banks in the state in which the national bank is located under 12 U.S.C. § 92a. National banks are likewise bound by the unclaimed property or escheat laws of the States under 12 U.S.C. § 484(b).

Second, even in this case where the Office of Thrift Supervision claims to "occupy the field" of lending regulation and deposit-related regulation for federal savings associations (a claim upheld by this Court in *de la Cuesta*), there remain a variety of state laws, not touching upon those activities, that are applicable even to federally-chartered institutions. These include, among others, contract and commercial law, real property law, homestead laws, tort, and criminal law. 12 C.F.R. § 560.2(c) (2002). Since federal law does not preempt and does not govern in these areas, it is entirely reasonable for a contracting bank to specify what law does govern--and to do so without in any way intending to give up its rights and expectations that federal law will continue to preempt those areas of state law that do touch upon lending and deposit-taking activities.

Since the Petition for Writ of Certiorari was filed in this case, the concerns raised by the reasoning of the Maryland Court of Appeals have become even more important and thus of more pressing need for review by this Court. As indicated above, the Petitioner, Chevy Chase Bank, F.S.B., is subject to regulation by the federal Office of Thrift Supervision, an agency whose organic statute and regulations occupy the field of lending and deposit-taking activities. But far more credit card issuers are not subject to OTS regulation. Rather, they are subject to the jurisdiction of commercial bank regulators, and most of

them to the jurisdiction of the Comptroller of the Currency, the regulator of national banks.

The Comptroller of the Currency has explicitly disclaimed the intention that his regulations (or his organic statute, the National Bank Act, itself) entirely preempts the field of regulating national banks' activities[5]. Nevertheless, like the Office of Thrift Supervision, the Comptroller has recently determined that certain classes of "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks." (69 Fed. Reg. 1916, col. 2-3 (Jan. 13, 2004)). Included among such laws are state laws pertaining to "[d]isclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit related documents[.]" (*Id.*, to be codified at 12 C.F.R. § 7.4008(d)(2)(viii)).[6] It is a determination and a final rule that clearly applies to the Maryland law in question here--a disclosure law invoked in the context of a credit related document, an amendment to the credit contract.

Thus, now for national banks, issuers of the great bulk of credit cards, as was earlier the case for Chevy Chase and other federally-chartered thrift institutions, the cognizant federal regulatory authority has, for good and valid reasons, pronounced laws like Maryland's

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[5] 69 Fed. Reg. 1911, col. 1 (Jan. 13, 2004).

[6] The Office of Thrift Supervision counterpart to the Comptroller's new regulation is found at 12 C.F.R. § 560.2(b)(9) (2002).

inapplicable. The Maryland Court of Appeals' reasoning effectively defeats the federal regulators' purposes unless the lending institutions either (a) choose to drop "choice of law" provisions from their contracts--something they cannot do as a practical matter or (b) attempt to re-write choice of law provisions to exclude some of the laws of the chosen state--an exercise in futility, since no one can anticipate either future enactments or even all future applications or attempted applications of current law.

Maryland cannot do this consistently with the Supremacy Clause of the Constitution. Yet if the decision below is not reviewed and reversed by this Court, other states may follow suit to the detriment of the banking industry and its consumers. The unpredictability and lack of uniformity of rules applicable to federally chartered institutions' lending activities that would be thereby engendered would be grossly inefficient and to no good end. That is a consideration recognized by this Court for a century:

> [The National Bank Act] has in view the erection of a system extending throughout the country, and independent, so far as the powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose *limitations and restrictions as various and numerous as the states*.

Easton v. Iowa, 188 U.S. 220, 229 (1903) (emphasis added).

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, the amici, American Bankers Association and Consumer Bankers Association, respectfully urge that the Petition be granted.

Respectfully submitted,

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